IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 63

FEDERAL POWER COMMISSION, *Petitioner*,

v.

TUSCARORA INDIAN NATION, *Respondent*

No. 86

POWER AUTHORITY OF THE STATE OF NEW YORK, *Petitioner*,

v.

TUSCARORA INDIAN NATION, *Respondent*

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT

ARTHUR LAZARUS, JR.
1700 K Street, N. W.
Washington 6, D. C.
Attorney for Respondent

Of Counsel:
EUGENE GRESSMAN

NOVEMBER 30, 1959.

INDEX

CITATIONS

Cases:

CONGRESSIONAL HEARINGS, REPORTS & DEBATES

MISCELLANEOUS: Page

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 63

FEDERAL POWER COMMISSION, *Petitioner*,

v.

TUSCARORA INDIAN NATION, *Respondent*

No. 66

POWER AUTHORITY OF THE STATE OF NEW YORK, *Petitioner*,

v.

TUSCARORA INDIAN NATION, *Respondent*

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

1. Whether the express consent of Congress necessary to overcome the specific statutory prohibitions in 25 U.S.C. §§ 177 and 233 against the alienation of Indian tribal lands and the specific protections in

16 U.S.C. § 797(e), against the indiscriminate licensing of Indian tribal lands can be found in Public Law 85-159, 71 Stat. 401, a general statute which, without describing the location or character of the project facilities, merely authorizes the construction of a power project and does not mention either Indians or their property.

2. Whether the Tuscarora Reservation is to be excluded from the statutory term "tribal lands embraced within Indian reservations," and thus is to be denied the benefits of an uncontested finding by the Commission under the first proviso in Section 4(e) of the Federal Power Act, solely because the Tuscarora Nation holds fee title to its tribal lands, even though the United States retains the power to control the alienation of those lands and maintains a guardianship relation to the Nation.

3. Whether the Court of Appeals, in the exercise of its "exclusive jurisdiction to affirm, modify or set aside" an order of the Commission under Section 313(b) of the Federal Power Act: (a) violated some principle of res judicata by passing upon the validity of the Commission's license order in this case because of a prior decision by the Court of Appeals for the Second Circuit in a related case where the Commission was not a party and the validity of the license was not litigated; or (b) exceeded judicial power, after being advised by the Commission that the required Section 4(e) finding could not be made with respect to the Tuscarora Reservation, by directing the Commission to exclude respondent's lands from the scope of the license instead of merely remanding the case to the Commission for further proceedings.

STATUTES INVOLVED

The relevant statutes are set forth in Appendix A to the Brief filed by the Power Authority of the State of New York, petitioner in No. 66,* at pp. 1a-7a, inclusive.

STATEMENT

1. *Origin of the Tuscarora Reservation.* Respondent, the Tuscarora Indian Nation, is a recognized tribe of American Indians which owns and occupies a reservation of 6,249 acres in Niagara County, New York. Originally resident of North Carolina, the Tuscarora Indians in the early Eighteenth Century were driven from their ancestral homes by white colonists and fled to New York, where they were adopted as the sixth nation of the famed Iroquois Confederacy. Although the bulk of the Tuscaroras initially settled in the central portion of the latter State, historical records further show that these Indians by 1780 already had begun to live on the site of their present reservation. R. Ex. 220-22.**

On October 22, 1784, at least four years after respondent's members first planted roots in Western New York, the United States entered into a Treaty with the Six Nations, 7 Stat. 15, Article II of which declared:

> "The Oneida and Tuscarora nations shall be secured in the possession of the lands on which they are settled."

* The brief of the petitioner in No. 66 is cited hereinafter as "PA Brief, ..."; the brief of the petitioner in No. 63, the Federal Power Commission, is cited as "FPC Brief, ..."

** The transcript of record consists of two volumes: the first volume, containing 334 pages of testimony, opinions and other proceedings, is cited hereinafter as "R. ....."; the second volume, containing 243 pages of exhibits, is cited as "R. Ex. ....."

This promise of protection by the Federal Government was reaffirmed in Article 3 of the Treaty of January 9, 1789, 7 Stat. 33, which, however, remained unratified. In the Treaty with the Six Nations of November 11, 1794, 7 Stat. 44, popularly known as the Treaty of Canandaigua, the United States again solemnly agreed not to disturb the Indians, including the Tuscarora Nation,[1] in the "free use and enjoyment" of their lands, which "shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase."

Less than three years later, on September 15, 1797, the Seneca Nation, with the consent of the United States, entered into an agreement (R. 311-15) with Robert Morris, acting on behalf of the Holland Land Company, for the sale of a large territory in Western New York, including the property being used and occupied by respondent. The Tuscarora Nation was not a party to this agreement, and is described in contemporaneous documents as having then been "forgotten." R. Ex. 165. The record discloses, though, that, following the 1797 Treaty, Robert Morris deemed respondent's claim to the lands upon which it was settled to be "so just" that he "granted to those Tuscaroras the use and occupancy" of one square mile, subject to a continuing pre-emptive right in favor of the Holland Land Company. R. Ex. 165. The Indians,

[1] Under Articles II and III of the Treaty of Canandaigua, the Federal Government guaranteed certain lands to the Six Nations and "their Indian friends residing thereon and united with them." The fact that these stipulations covered the Tuscarora Nation is evidenced by the signature on the Treaty of "Kanatsoyh, alias Nicholas Kusik", identified as a Tuscarora under the name "Kanatjogh, or Nicholas Cusick" in the Treaty of December 2, 1794, 7 Stat. 47, and under the name "Kanat-soyh, or Nicholas Cusick" in the Treaty of January 15, 1838, 7 Stat. 550.

expressing the view that the tract so granted was insufficient for their needs and did not include the whole of their houses and farms, requested that an additional area of land be set aside for their reservation. R. Ex. 166, 168-70. Shortly thereafter, the Holland Land Company authorized and directed its agent "to lay off two square miles of land to include the Tuscarora Village, which land should be granted to the Indians for their sole use and benefit as long as they should think proper to reside thereon." R. Ex. 167. This tract and a grant of an additional 640 acres from the Seneca Nation (R. Ex. 201-2) form the nucleus of the present Tuscarora Reservation.

Beginning in 1801, the Tuscarora Indians also commenced dealings with the United States looking towards the sale of lands belonging to the Nation in North Carolina and the purchase of additional lands adjacent to their residence in New York.[2] R. Ex. 171-79, 223-33. For a period of several years, officials of the Federal Government in fact did carry on extensive and delicate negotiations for the purchase and sale of land on behalf of the Tuscarora Nation. R. Ex. 181-85. Finally, on November 28, 1804, Secretary of War Dearborn advised the United States Indian-

[2] In the words of Longhard, one of the Tuscarora chiefs, addressed to the Secretary of War (R. Ex. 178):

> "The Tuscarora's wish from the avails of the land sold in North Carolina to purchase about five miles square of the Holland Company, joining to, and running parallel with the lands now possessed and occupied by the Tuscarora Nation."

To this request the Secretary replied (R. Ex. 179):

> "I will receive the money which may be transmitted by your agent in North Carolina, and have it safely lodged in the Bank, where it will rest until it can be applied to the object contemplated by you."

Agent having jurisdiction over respondent (R. Ex. 188):

> "The bargain has been closed with Mr. Busti Agent for the Holland Company for the lands you agreed for on the part of the Tuskarora Indians and I have received a Deed of the same by which I am to hold the lands in trust for said Nation, and have made the first payment therefor with the money which had been rec'd for their lands in North Carolina—You will therefore inform the Chiefs they may take possession of and occupy said lands as those of their Nation."

Both the court below (R. 429) and the Court of Appeals for the Second Circuit (*Tuscarora Nation of Indians v. Power Authority*, 257 F. 2d 885, 887) correctly recognized the vital role which the United States thus played in acquiring an additional 4329 acres for inclusion within the Tuscarora Reservation.

This last tract, to which the Nation received a deed in 1809,[3] includes all of the lands involved in this case.

[3] The fact that respondent was given a deed to this area by the Secretary of War is, of course, primarily a matter of historical accident. During the early part of the Nineteenth Century, the treaties between Indian tribes and the United States generally provided, apart from mutual promises of peace and friendship, for land cessions by the Indians and their removal to the West. Cohen, *Handbook of Federal Indian Law* (U.S.G.O., 4th Ed., 1945), at pp. 48-62. Only at a later date did more formal trust language become standard in defining the tribal estate, with the Federal Government holding bare legal title and the Indians possessing a complete beneficial interest. These distinctions, however, always have been treated as matters of form rather than substance—a truism illustrated in respondent's case by the Treaty of January 15, 1838, 7 Stat. 550, 554, under which the Tuscarora Nation conveyed most of its land to the United States and, with the approval of the United States, conveyed the remainder to third parties. Although the latter conveyance subsequently was annulled and

2. *History of this Litigation*—In 1950, the United States and Canada entered into a treaty establishing the amount of water each nation might divert from the Niagara River for power purposes. 1 U.S.T. 694. Thereafter followed seven years of Congressional hearings and vigorously contested litigation to decide how that power should be developed. FPC Brief, pp. 7-8, fn. 5 and 6. The advocates of public and private power each possessed sufficient weight to block the other group from moving forward, but neither side possessed sufficient strength to push through to ultimate victory.

In 1957, a compromise satisfactory to all parties finally was achieved. By Section 1(a) of the Act of August 21, 1957, Public Law 85-159, 71 Stat. 401, Congress directed the Federal Power Commission "to issue a license to the Power Authority of the State of New York for the construction and operation of a power project with capacity to utilize all of the United States share of the water of the Niagara River permitted to be used by international agreement." Then in Section 1(b) of the statute, Congress further directed the Commission to impose certain express conditions on the license "in addition to those deemed necessary and required under the terms of the Federal Power Act." The seven conditions so specified by Congress constituted the concessions to private power companies, neighboring States and other economic and

other provisions of the agreement were not carried out. Article 14 of the 1838 Treaty, which recited that the Tuscaroras were conveying the property which they owned in fee to the United States "in order to have the same done in a legal and proper way," clearly reflected an understanding by the parties that the Federal Government still retained a paramount interest in and authority over the disposition of such Indian tribal lands. 7 Stat. 554; cf. *The New York Indians*, 5 Wall. (U.S.) 761 (1867).

political interests so essential to passage of the legislation.

In the Act of August 21, 1957, therefore, Congress determined as a matter of policy how the waters of the Niagara River were to be utilized. Congress, however, did not designate the location of the power project, describe the nature of the project works or otherwise approve any particular engineering plan for power development—all technical matters within the special competence of the Commission and thus referred for decision by it under the provisions of the Federal Power Act. Moreover, Congress in Public Law 85-159 did not refer to the Tuscarora Indian Nation or the Tuscarora Reservation. Indeed, the legislative history of this 1957 statute is devoid of the slightest indication that Congress or any of its committees knew or even suspected that Indian land ultimately might be desired in construction of the Niagara Project.

On January 30, 1958, after hearings, the Federal Power Commission issued a license to the Power Authority of the State of New York "under the provisions of Section 4(e) of the Federal Power Act and Public Law 85-159 (71 Stat. 401)" for construction of the Niagara Project. R. 404. Petitioner's license was issued over the protest of respondent, the Tuscarora Indian Nation, which had intervened in the proceeding and had argued against the proposed use of approximately 1,000 acres within its reservation for a water storage reservoir. Respondent's objection to this project facility was based in part upon the licensee's lack of legal authority to acquire Indian lands without the express consent of Congress. The Commission declined to pass upon that question on the ground that "other

lands are available for reservoir use if the Applicant [Power Authority] is unable to acquire the Indian lands, although alternative lands may be more expensive." R. 395.

In denying the Tuscarora Nation's petition for rehearing, the Commission on March 21, 1958, again refused to decide whether the Power Authority lawfully could acquire Indian lands, ruling that this issue was "a question to be resolved by a court of competent jurisdiction." R. 413. The Commission further held that respondent's property was not part of a "reservation" within the meaning of Section 4(e) of the Federal Power Act, and hence need not be made the subject of a finding by the Commission as to whether the license would "interfere or be inconsistent with the purpose for which such reservation was created or acquired." *Ibid.*

On May 16, 1958, less than 60 days after the denial of the rehearing application, respondent filed in the United States Court of Appeals for the District of Columbia Circuit a petition for review of the Commission's order of January 30, 1958, pursuant to Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b). The District of Columbia court thereby acquired "exclusive jurisdiction to affirm, modify or set aside such order in whole or in part." *Ibid.*

In the meantime, on March 21, 1958, the Power Authority filed a petition in the Supreme Court of the State of New York for Niagara County to condemn 1,300.35 acres of land belonging to the Tuscarora Nation for use in the Niagara Project. On April 15, 1958, however, the Power Authority wholly abandoned this judicial proceeding and, purportedly acting pur-

suant to a newly-adopted State law, attempted to appropriate over 1383 acres[4] within the Tuscarora Reservation by the mere filing of a map in the office of the State Superintendent of Public Works.

Faced with an imminent appropriation of its property under State law before the District of Columbia court could determine the validity of the basic license, respondent filed a complaint in the United States District Court for the Southern District of New York on April 18, 1958, seeking, *inter alia*, a declaratory judgment to the effect that the Power Authority had no right to acquire lands belonging to the respondent without the express consent of the United States and a permanent injunction prohibiting the Power Authority from acquiring or attempting to acquire by appropriation, condemnation or otherwise lands belonging to the respondent in the absence of such consent. A temporary restraining order to the latter effect and further prohibiting the Power Authority from entering the Tuscarora Reservation, with certain exceptions, was granted by the court. The case then was transferred to the United States District Court

[4] The increase of 83 acres in the amount of territory within the Tuscarora Reservation which the Power Authority sought to acquire did not come about through an engineering decision, but rather resulted from a decision on legal tactics—the desire to have project facilities located only on the tract purchased by the United States for respondent in 1804 and not, as the reservoir plans originally were drawn, in part also on the two other tracts which the Indians possessed before that date. Moreover, the fact that the area of Tuscarora land demanded by the Power Authority repeatedly changed prior to April 15, 1958, demonstrates that petitioner's own concept of the Niagara Project did not become final until almost a year after Congress had acted.

for the Western District of New York.[5] *Tuscarora Nation of Indians* v. *Power Authority of the State of New York*, 161 F. Supp. 702 (S.D.N.Y., 1958).

On June 24, 1958, following a hearing, the District Court for the Western District of New York dissolved the temporary restraining order, denied the motion for a permanent injunction and dismissed the complaint. *Tuscarora Nation of Indians* v. *Power Authority of the State of New York*, 164 F. Supp. 407 (W.D. N.Y., 1958). Immediately thereafter, respondent prosecuted an appeal to the United States Court of Appeals for the Second Circuit, which reinstated the stay previously in effect, with minor modifications, pending a final decision.

On July 24, 1958, the Court of Appeals for the Second Circuit reversed the judgment below insofar as the District Court had dismissed the complaint and thereby had blocked the Tuscarora Nation from any relief by way of a declaration of rights. Specifically, the Court of Appeals held that the United States, by vir-

[5] The Government points out that, while these proceedings were pending, the Power Authority and the Indians were engaged in negotiations looking towards a possible settlement, and that petitioner made an offer to respondent which "has never been withdrawn." FPC Brief, pp. 15-16. What the Government unfortunately fails to point out is that the Power Authority's "offer" was and still is an empty gesture since, as the court below and the Court of Appeals for the Second Circuit both ruled (R. 423-24), the Tuscarora Nation is prohibited by law from selling its lands without the consent of the United States expressed in an act of Congress. 25 U.S.C. §§ 177, 233. What actually happened is that the parties eventually reached agreement on virtually all economic issues, and then petitioner broke off all further negotiations by adamantly insisting upon an impossible and illegal demand, i.e., that "we cannot and will not make a settlement contingent upon the passage of Federal legislation." Letter of Chairman Robert Moses of the New York Power Authority to counsel for respondent, dated January 23, 1959.

tue of 25 U.S.C. §§ 177 and 233, had retained paramount authority to control the alienation of Indian tribal lands in the State of New York, although, of course, these protective statutes were subordinate to a proper exercise of the Federal Government's own right of eminent domain. Since the appropriation proceedings instituted by the Power Authority under New York law did not stem from or otherwise involve the exercise of any Federal condemnation power, these proceedings were vacated and annulled.[6] *Tuscarora Nation of Indians* v. *Power Authority*, 257 F. 2d 885 (C.A. 2, 1958).

The Court of Appeals for the Second Circuit further ruled, however, that, if the Commission license were valid—an issue which concededly was still pending before the District of Columbia court—then the Power Authority could exercise a Federal right of eminent domain with respect to the Tuscarora Reservation through regular condemnation proceedings. In support of this conclusion, the court cited not only Section 21 of the Federal Power Act, 16 U.S.C. § 814, but also Public Law 85-159, 71 Stat. 401, the 1957 act directing the issuance of a license to the Power Authority for the Niagara Project. As to the latter statute, the court said that Congressional permission for the taking

[6] This aspect of the Court of Appeals ruling, dealing with the inapplicability of the State appropriation procedure, is the subject of an appeal still pending in this Court filed by the New York Superintendent of Public Works, *McMorran* v. *Tuscarora Nation of Indians*, No. 4, Oct. Term, 1959. On July 27, 1958, however, the Power Authority abandoned the State appropriation procedure and instituted a condemnation suit in the United States District Court for the Western District of New York, *Power Authority of the State of New York* v. *1383.55 Acres of Land, et al.*, Civil Action No. 7934 (W.D.N.Y.). In view of this action, respondent herein has filed a suggestion of mootness in No. 4.

of respondent's land could be found by inference from the nature of the project and its proximity to the Reservation or from the impracticability of constructing it without taking a portion of the Tuscarora Reservation." 257 F. 2d at 893.

On September 8, 1958, Mr. Justice Harlan stayed the execution and enforcement of the judgment of the Court of Appeals for the Second Circuit, with one exception not here relevant, conditioned upon the filing of a petition for a writ of certiorari by the Tuscarora Nation on or before September 19, 1958. *Tuscarora Nation of Indians* v. *Power Authority*, 79 Sup. Ct. 4 (1958). Respondent duly filed such a petition, requesting interim relief from the impact of the Second Circuit decision until the District of Columbia court could determine the validity of the license and asserting that the Second Circuit decision raised a novel and important question as to the extent to which a general statute which does not mention an Indian tribe or its lands can be said to express a Congressional intent to lift specific Federal protections against the alienation of such lands. *Tuscarora Nation of Indians* v. *Power Authority of the State of New York*, No. 384, Oct. Term, 1958. This petition for a writ of certiorari was denied on October 13, 1958. 358 U.S. 841. A motion for leave to file a conditional petition for rehearing out of time was denied on June 22, 1959. 360 U.S. 923.

On November 14, 1958, the Court of Appeals for the District of Columbia Circuit, after an expedited hearing, issued a memorandum opinion which subsequently ripened into the decision about which petitioners here complain. *Tuscarora Indian Nation* v. *Federal Power Commission*, 265 F. 2d 338 (C.A.D.C., 1958). The court

there held: (a) that the United States, by virtue of 25 U.S.C. §§ 177 and 233, controls the alienation of lands within the Tuscarora Reservation, and that these lands cannot be taken by the Power Authority for reservoir purposes without the consent of the United States; (b) that such consent is not to be found in the 1957 statute authorizing the issuance of a license to the Power Authority, Public Law 85-159, 71 Stat. 401; (c) that the 1957 statute obliged the Commission in licensing the Power Authority to adhere to all conditions required by the Federal Power Act, including the proviso in Section 4(e) that projects may be located within Indian reservations "only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired"; and (d) that the Commission thus could not issue a license for the construction of a reservoir on Tuscarora lands unless it made the finding required by this proviso in Section 4(e). Accordingly, the case was remanded to the Commission "that it may explore the possibility of making that finding" and the court retained jurisdiction of the cause pending receipt from the Commission of notice of its action pursuant to the limited remand. R. 431-32. The Commission was given fifteen days during which to respond. R. 432.

On November 17, 1958, the Commission issued a Notice of Further Hearing "upon the questions presented and for the purposes set forth in Section VII" of the November 14 opinion of the Court of Appeals, i.e., solely on the possibility of making the required Section 4(e) finding. 23 *Fed. Reg.* 9101. That hearing commenced on November 24, but became so protracted and covered such a host of issues beyond what was

specified in Section VII of the court opinion, and in the Notice, that the Commission was forced to obtain numerous extensions of time during which to report its action back to the Court of Appeals.

Finally, on February 2, 1959, the Commission, after consideration of the exhaustive record, the detailed written briefs and the lengthy oral argument, determined that "the license issued herein insofar as it includes lands of the Tuscarora Indian Nation will interfere and will be inconsistent with the purpose for which such reservation was created or acquired." R. 489. In other words, the Commission concluded that the finding which the Court of Appeals had found essential as a condition precedent to a valid grant of a license on Indian lands could not be made. On February 25, the Commission denied the Power Authority's application for a rehearing of this decision. R. 506-510. The Commission's holding that a Section 4(e) finding could not be made in this case never has been appealed and, therefore, is final and not before this Court.

On March 24, 1959, the Court of Appeals denied all motions for reconsideration of its memorandum opinion of November 14, 1958, and entered a final order approving the license issued to the Power Authority for the Niagara Project "except in so far as it would authorize the condemnation of Tuscarora Indian tribal lands for reservoir purposes." R. 533. The Court further ordered "that this case be remanded to the Commission with instructions to amend its licensing order so as to exclude specifically the power of the said Power Authority to condemn the said lands of the Tuscarora Indians for reservoir purposes." *Ibid.* The instant petitions for certiorari were prosecuted from this order of the court below.

In the meantime, on March 2, 1959, the Power Authority filed with the Commission an application for an amended license which requests permission to construct a storage reservoir wholly outside the Tuscarora Reservation. In that application the Power Authority states that it "cannot afford to await the outcome of further litigation, but must proceed with an amendment to the license and construction of the reservoir [off Tuscarora land] without further delay." The Commission gave official notice of a hearing on this application under date of March 3, 1959, asserting that the "matter is one that should be disposed of as promptly as possible. . . ." 24 *Fed. Reg.* 1711. Nearly nine months have passed and nothing further has happened.

SUMMARY OF ARGUMENT

I

A. The United States possesses a paramount power to control the lands owned and occupied by Indian tribes. Over the years, the Government also has assumed a special protective relationship towards Indians, known generally as guardianship. As an incident of guardianship, and in the exercise of supreme Federal authority, Congress has prohibited the alienation or other disposition of Indian tribal lands without the consent of the United States. R.S. 2116, 25 U.S.C. § 177. This Federal statutory restraint upon alienation applies equally to lands held in trust by the United States and to lands, such as the Tuscarora Reservation, owned in fee by the Indians, and, by virtue of 25 U.S.C. § 233, clearly is also applicable to Indian reservations in the State of New York. The restraint on alienation, coupled with the powers of the United

States as guardian, further creates a Federal interest in all Indian tribal lands.

B. As a necessary corollary of overriding Federal authority and Federal protections is the principle of law that lands belonging to Indian tribes, including respondent's property, may not be taken or otherwise appropriated except to the extent that Congress explicitly consents. The basic rule, as announced by this Court, is that general acts of Congress do not apply to Indians "unless so expressed as to clearly manifest an intention to include them." *Elk* v. *Wilkins*, 112 U.S. 94, 99 (1884). The safeguards over and resultant interest in the Tuscarora Reservation which Congress has established by legislation reflect a beneficial national policy and may not be overcome or eliminated in the absence of the clearest and most unequivocal legislative intent.

C. Relevant canons of statutory construction invoked by this Court in cases involving tribal property augment the necessity for express Congressional consent to the condemnation of lands within the Tuscarora Reservation. Fundamental is the rule that laws affecting Indians must be liberally construed for their benefit and protection. *Choate* v. *Trapp*, 224 U.S. 665, 675 (1912). "Doubtful expressions must be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith." *Carpenter* v. *Shaw*, 280 U.S. 363, 367 (1930). And, more generally, statutory grants which operate to relinquish a public interest must be strictly construed, with nothing passing by mere implication. *Coosaw Mining Co.* v. *South Carolina*, 144 U.S. 550, 562 (1892).

II

The express Congressional consent necessary to the taking of Tuscarora lands cannot be found in, or implied from, the Niagara Development Act of 1957 (Public Law 85-159), a general statute which mentions neither respondent nor its reservation.

A. In Section 1(a) of the 1957 Act, Congress implemented a 1950 Treaty with Canada (1 U.S.T. 694) by directing the Federal Power Commission to issue a license to the New York Power Authority for construction of the Niagara Power Project. In Section 1(b) of the Act, Congress further directed the Commission to impose seven conditions on the license "in addition to those deemed necessary and required under the terms of the Federal Power Act"—the conditions so specified being the concessions to private power companies, neighboring States, and other economic and political interests considered essential to passage of the legislation. With respect to all other features of the Niagara Project, including technical matters, however, Congress directed the Commission to issue the license pursuant to the terms of the Federal Power Act. S. Rep. No. 539, 85th Cong., 1st Sess. (1957), p. 1. Congress in Public Law 85-159, therefore, did not exercise the totality of its authority with respect to development of the Niagara River and did not supersede the Federal Power Act to the extent of specifying project facilities in any particular form. Accordingly, a taking of Tuscarora lands by necessary implication cannot be found.

B. Moreover, even if Public Law 85-159 did supersede Section 4(e) of the Federal Power Act, Congress in the 1957 statute still did not expressly authorize or

otherwise consent to the taking of respondent's lands for power project purposes." Not the slightest reference to or mention of the Tuscarora Indian Nation or the Tuscarora Reservation appears at any place on the face of the statute. In addition, the legislative history of the 1957 Act is wholly silent with respect to respondent and thus conclusively demonstrates that Congress could not possibly have possessed an awareness or knowledge that part of the Tuscarora Reservation might be desired for the Niagara Project. To find the requisite express Congressional consent to the taking of respondent's tribal property under such circumstances would violate the plain words of the statute as well as every relevant canon of statutory construction.

C. As heretofore noted, the rule of law is clear that the necessary legislative authority for the alienation of Tuscarora lands cannot be found by implication from the nature or scope of the Niagara Project. Even if a finding of "consent by implication" were permissible, however, such a conclusion cannot properly be drawn on the facts of this case. Specifically, at the time Public Law 85-159 was enacted, respondent's property was not essential in the construction of the Niagara Project to maximum planned capacity; indeed, as of January 30, 1958, the Commission declared that "other lands are available for reservoir use if the Applicant [Power Authority] is unable to acquire th Indian land[s] . . . ." R. 395. Furthermore, the record does not disclose any basis for imputing to Congress the knowledge or even a suspicion that a portion of the Tuscarora Reservation might be desired for a storage reservoir. In the absence of a necessity to use Tuscarora lands and in the absence of Congressional

knowledge that such lands might be used for the Niagara Project, "consent by implication" to the condemnation of respondent's reservation may not be found.

III

The requisite Congressional consent to the alienation of Indian tribal lands may be found in this case, if at all, only in the provisions of the Federal Power Act, 16 U.S.C. §791a *et seq.* To the extent that the Tuscarora Nation loses under that Act the protections of 25 U.S.C. §§ 177 and 233, of course, respondent automatically becomes entitled to the protections over Indian tribal lands provided by the Federal Power Act. The Tuscarora Reservation thus may not be licensed by the Federal Power Commission for use in the Niagara Project in the absence of the finding required under Section 4(e), 16 U.S.C. §797(e).

A. Respondent's lands are tribal lands within an Indian reservation subject to the supervision of the Secretary of the Interior. Indeed, the fact that the Tuscarora Reservation is an Indian reservation is not disputed. Since respondent's lands originally were granted to the Nation and the Nation is prohibited from disposing of its property without the consent of the United States, which consent never has been given, the Tuscarora Reservation as a matter of law and fact must consist of tribal lands. Finally, the Federal Government has exercised supervision over the Tuscarora Reservation, and only Congress, not the courts, may determine when that special relationship shall cease. *Winton* v. *Amos*, 255 U.S. 373, 391-92 (1921).

B. Given the fact that respondent's lands are tribal lands within an Indian reservation subject to the

supervision of the Secretary of the Interior, the Tuscarora Reservation by definition is a "reservation" within the meaning of Sections 3(2) and 4(e) of the Federal Power Act. The fact that respondent's lands are held in fee by the Nation is immaterial, since Federal protections apply equally to all lands of tribes recognized by the United States, whether or not the Indians' title is derived from the Government and whether or not the Government has a proprietary interest. *United States* v. *Candelaria*, 271 U.S. 432 (1926); *United States* v. *Sandoval*, 231 U.S. 28 (1913); *United States* v. *7,405.3 Acres of Land, etc.*, 97 F. 2d 417 (C.A. 4, 1938).

Specifically: (1) the plain language of the Federal Power Act precludes any distinction between tribal lands owned in fee by the Indians and tribal lands held in trust by the Federal Government; (2) the legislative background and legal environment in which the Federal Power Act is set, including administrative interpretations of related laws, militate against a conclusion that the statutory definition of reservations is limited to Indian tribal lands in which the United States has a proprietary interest; (3) the United States has a sufficient interest in the Tuscarora Reservation (*Heckman* v. *United States*, 224 U.S. 413, 444-46 (1912)) to bring respondent's lands within the scope of the term "interests in lands" used in Section 3(2); (4) restricting the term "reservations" to tribal lands which the Federal Government may dispose of under the Property Clause of the Constitution would exclude the bulk of all Indian reservations in the United States from the protections of the Federal Power Act (*Shoshone Tribe* v. *United States*, 299 U.S. 476, 497 (1937); *United States* v. *Creek Nation*, 295

U.S. 103, 109-10 (1935)); and (5) to deprive the Tuscarora Nation of the benefits of Section 4(e) would be contrary to well-settled Government policies to safeguard Indian tribes in the use and enjoyment of their lands.

C. Since Tuscarora lands constitute tribal lands embraced within an Indian reservation as defined in Section 3(2) of the Federal Power Act, respondent is entitled to the benefit of the uncontested finding by the Commission under Section 4(e) that the Niagara Project will be inconsistent with the purposes for which the Tuscarora Reservation originally was established.

IV

The Court of Appeals properly directed the Commission to exclude Tuscarora lands from the scope of the license issued to the Power Authority. In the first place, the court below was not precluded from deciding the validity of the Commission's license order by any decision of the Court of Appeals for the Second Circuit. 16 U.S.C. §§ 825*l*(b); *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 334-337 (1958). Secondly, having correctly decided that the license could not validly cover any portion of the Tuscarora Reservation, the court below did not invade an administrative function by ordering that the license be amended so as to eliminate all impact upon the reservation.

ARGUMENT

I. THE TUSCARORA RESERVATION IS SUBJECT TO FEDERAL PROHIBITIONS AGAINST THE ALIENATION OF INDIAN LANDS AND MAY NOT BE TAKEN OR OTHERWISE ACQUIRED FROM RESPONDENT WITHOUT THE EXPRESS CONSENT OF CONGRESS.

Basic to an understanding and resolution of the issues in this case is an awareness that the United States possesses paramount power to control the disposition of Indian lands and has exercised that supreme authority to place the Tuscarora Reservation under a general restraint on alienation. The doctrine of paramount Federal power and its particular application to respondent's fee lands—both of which are conceded by the Solicitor General before this Court[7]—penetrate and color every major question of statutory interpretation here under consideration. For as a necessary corollary of this overriding Federal authority and resultant Federal protection is the principle of law that lands belonging to Indian tribes, including the Tuscarora Reservation, may not be appropriated or otherwise invaded unless Congress *expressly* consents.

A. The United States Possesses Paramount Power to Control the Disposition of Indian Lands and Has Exercised That Authority to Restrict the Alienation of Respondent's Tribal Property.

From the earliest days of our Nation, the Congress of the United States always has retained the power to govern and control the territory reserved and held by Indian tribes for their permanent use and occu-

[7] In the words of the Government Brief at pp. 55-6, tribal fee lands within the Tuscarora Reservation "are protected by the statutes prohibiting alienation of Indian lands without federal approval . . ."

pancy. The several States, including the State of New York, have no express power over Indian affairs comparable to the authority delegated to Congress under the Constitution.[8] Accordingly, wherever a conflict over jurisdiction has arisen, this Court consistently has ruled that the Federal Government, and not the States within which such tracts may be located, has the basic and thus superior right to legislate for the regulation and protection of Indian reservations. *Worcester* v. *Georgia*, 6 Pet. (U.S.) 515 (1832); *The Kansas Indians*, 5 Wall. (U.S.) 737 (1867); *United States* v. *Kagama*, 118 U.S. 375 (1886); *Creek County* v. *Seber*, 318 U.S. 705 (1943); *Williams* v. *Lee*, 358 U.S. 217 (1959). And with specific reference to the disposition of real property, the Court as long ago as 1823 held that Indian lands may be sold only to the United States or with the consent of the United States. *Johnson* v. *McIntosh*, 8 Wheat. (U.S.) 543 (1823).

The doctrine of Federal supremacy with respect to Indian lands has evolved through the years into the

---

[8] E.g., Article I, Section 8, authorizing Congress to regulate commerce with the Indian tribes, and Article II, Section 2, authorizing the President, by and with the advice and consent of the Senate, to make treaties. See *Martin* v. *Hunter's Lessee*, 1 Wheat. (U.S.) 97 (1816), in which the Court declared at p. 102:

> "There can be no doubt that it was competent to the people to invest the general government with all the powers which they might deem proper and necessary; to extend or restrain these powers according to their own good pleasure, and to give them a paramount and supreme authority. As little doubt can there be that the people had a right to prohibit to the states the exercise of any powers which were, in their judgment, incompatible with the objects of the general compact; to make the powers of the state governments, in given cases, subordinate to those of the nation . . . ."

modern concept that the Federal Government occupies a special position as the guardian of Indian tribes throughout the Nation. Thus, in describing this fiduciary relationship, the Court said in *United States* v. *Kagama*, 118 U.S. 375 at 383-4 (1886):

> "* * * These Indian Tribes *are* the wards of the Nation. They are communities *dependent* on the United States; dependent for their political rights. * * * From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this Court whenever the question has arisen.

See also *United States* v. *Candelaria*, 271 U.S. 432, 439 (1926).

The protective relationship of the United States to Indian tribes is epitomized in the adoption of Federal legislation to prevent the improvident disposition of tribal property. R.S. 2116, 25 U.S.C. § 177. In pertinent part, the statute provides:

> "No purchase, grant, lease, or other conveyance of land, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. * * * The agent of any State who may be present at any treaty held with Indians, under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians compensation to be made for their

claim to lands within such State, which shall be extinguished by treaty.'"[9]

This provision, in other words, dictates that no disposition of Indian tribal lands may be valid in law or equity without express Congressional approval.

The application of 25 U.S.C. §177 to tribal lands owned in fee cannot now be questioned. Federal protections, the courts uniformly have ruled, shield all lands of tribes recognized by the United States, whether or not the Indians' title is derived from the Government and whether or not the Government has a proprietary interest. *Pueblo of Santa Rosa* v. *Fall*, 273 U.S. 315, 320 (1927); *United States* v. *Candelaria*, 271 U.S. 432, 441-43 (1926); *United States* v. *Sandoval*, 231 U.S. 28, 48 (1913);[10] *United States* v. *7,405.3 Acres of Land, etc.*, 97 F. 2d 417 (C.A. 4, 1938); Cohen, *Handbook of Federal Indian Law* (G.P.O., 4th Ed., 1945), p. 321; 18 Ops. Att'y Gen. 235 (1885). The whole thrust of 25 U.S.C. § 177 is to protect tribal possession of lands, a very real and continuing Federal interest which in no way is dependent upon whether the technical fee is in the United States or in the Indians.

---

[9] This statute is not rendered obsolete by the fact that since 1871 the practice of making treaties with Indians has been abolished. 25 U.S.C. § 71. The change was only one of method. After that date many agreements or conventions have been made with Indian tribes, the difference being that now such contracts are approved by both Houses of Congress rather than by the Senate alone. Cohen, *Handbook of Federal Indian Law* (G.P.O., 4th ed., 1945), pp. 66-67.

[10] In seeking to distinguish the cases cited in the text, the Power Authority relies heavily upon *United States* v. *Joseph*, 94 U.S. 614 (1876). SPA Brief, p. 56. Although the decision was not overruled in so many words, the rationale of the *Joseph* case was repudiated by this Court in the *Sandoval* case. 231 U.S. at 48-9.

Similarly beyond doubt is the applicability of 25 U.S.C. § 177 to the State of New York and, more particularly, to the Tuscarora Reservation. In 1950, when providing for the transfer of civil jurisdiction over Indian reservations from the United States to the State of New York, Congress made plain (Act of September 13, 1950, 64 Stat. 845, 25 U.S.C. § 233):

> "That nothing herein contained shall be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians of any lands within any Indian reservation in the State of New York. . . ."

The legislative history of the 1950 Act clearly demonstrates that Congress there intended to preserve Federal control over the sale or other disposition of Indian lands in the State. Specifically, the Report of the House Committee on Public Lands on S. 192 (H. Rep. No. 2270, 81st Cong., 2d Sess.), which eventually became 25 U.S.C. § 233, declared:

> "This bill provides that the Indians in the State of New York shall be subject to the civil laws of the State with the following exceptions:
>
> * * *
>
> "(4) That nothing contained in the act shall be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians of any lands within any Indian reservation in the State of New York."[11]

Of even greater significance in this case is the Report of the Joint Legislative Committee on Indian Affairs to the Legislature of the State of New York,

---

[11] Comparable language appears in S. Rep. No. 1836, 81st Cong., 2d Sess. (1950), on the same bill.

which is printed in the *Congressional Record* for June 16, 1950, the day when S. 192 passed the Senate. This Report, which thus was available to all members of Congress, reads in part as follows (96 CONG. REC. 8738-39):

> "Since 1942, however, reservation Indians have been clothed with a degree of immunity from State law by reason of the decision in *United States* v. *Forness* (125 Fed. 2d 928, cert. den. 316 U.S. 694) which appiled [sic] the principle first declared in Worcester v. Georgia (6 Pet. 515 (1832)), holding that State laws do not apply to reservation Indians except insofar as the Federal Government has given its consent.
>
> * * *
>
> "The only significant changes to be expected from passage of the bills would be the positive ones of extending orderly processes of government to the reservations and of ending the power of individual Indians to avoid ordinary civil responsibilities. Passage of the bills would not effect any change in basic Indian traditions or customs unless these people, by means provided in the law, see fit to modify them. Enactment would, in fact, strengthen enforcement of such rules as do exist by banishing uncertainty as to the powers of State courts. *Neither would the proposed law permit taxation or alienation of reservation land*, although many Indians have been led to believe that these are the very ends the bills aim to accomplish.
>
> "Specific exclusion of the powers of taxation and disturbance of titles makes it clear that adoption of the bills would not end all Federal guardianship. . . ." (Emphasis supplied.)

This quotation illustrates the fact that State officials, as well as members of Congress, recognized that New York did not then possess, and after passage of the

1950 Act still does not possess, the power to acquire Indian lands without express permission from the United States. Indeed, this very conclusion has just been reached, following a detailed study of the law, by another special committee of the New York Legislature. *N.Y. Special Legislative Committee on the Revision and Simplification of the Constitution*, Leg. Doc. (1958) No. 57, Ch. V, pp. 33-42 (reproduced in part at R. 377-80).

The view that 25 U.S.C. §§ 177 and 233 have current application to the Tuscarora Reservation, thereby preserving Federal control over the alienation of repondent's tribal lands, is the consistent conclusion reached by all courts faced with the question. Thus the Court of Appeals for the Second Circuit, in litigation related to this case, after thoroughly reviewing the foregoing statutes and relevant judicial decisions, decided that tribal lands within the Tuscarora Reservation could not be acquired by the Power Authority of the State of New York for reservoir purposes without the consent of the United States. *Tuscarora Nation of Indians* v. *Power Authority*, 257 F. 2d 885 (C.A. 2, 1958). In so holding, the court recognized that prior to 1950 (257 F. 2d at 889):

> "... the Court of Appeals of New York has recognized that during all of this period, the Indians are and always have been, since the formation of this Government, the wards of the Nation and not of the States, and that the Federal Government has never relinquished its suzerainty over them."

As to the situation subsequent to 1950, when 25 U.S.C. § 233 became law, the Court of Appeals concluded (257 F. 2d 891):

> "Not only has Congress not abandoned the field with respect to the property interests of Indian tribes in the State of New York but it has, by the enactment of the express reservation concerning land interests in New York in Title 25 U.S.C.A. Sec. 233, pointed up and reaffirmed its paramount authority over Indian fribal lands."[12]

So, also, the court below acknowledged that 25 U.S.C. §§ 177 and 233 operate to require the consent of the United States before any alienation of Tuscarora land can be permitted, whether by way of condemnation or otherwise. The court held (265 F. 2d 338 at 339):

> "The relationship of the United States to the Tuscarora Indians resembles a guardianship, and control over the alienation of their lands is in the United States. [Citing and quoting 25 U.S.C. § 177 and § 233] . . . The United States Court of Appeals held that the lands involved here are protected by that provision. . . . To validate the taking of these lands by the Power Authority of New York for reservoir purposes, the consent of the United States must be found in some manner."

Finally, the consistent viewpoint of the Federal Departments and of recent legal commentators has been a recognition and acceptance of the applicability of 25 U.S.C. §§ 177 and 233 to Indian tribal lands in New

---

[12] The Power Authority's quarrel (Brief, pp. 62-4, 82-4) with this conclusion of the Court of Appeals for the Second Circuit sharply contrasts with its insistence (Brief, pp. 87-95) that, in regard to the validity of the Commission's license order, an issue upon which the Second Circuit did not pass, its decision in res judicata.

York and, in particular, to the Tuscarora Reservation.[13] Gunther, *Governmental Power and New York Indian Lands—A Reassessment of a Persistent Problem in Federal-State Relations*, 8 BUFFALO L. REV. 1 (1958); see Point III, pp. 59-61, *infra*.

Thus, there is no responsible dissent from the proposition that the United States through 25 U.S.C. §§ 177 and 233 possesses and has exercised paramount control over the alienation of all or any part of the Tuscarora Reservation. That control or power, which evidences a vital Federal interest in respondent's lands, is the single most important fact in this case and is the critical starting point in resolving the legal issues here presented.

B. Tribal Lands, Including Respondent's Reservation, Subject to Federal Restrictions on Alienation, May Not be Condemned or Otherwise Acquired in the Absence of Explicit Congressional Consent.

From paramount Federal control over Indian reservations, and the parallel Federal relationship as guardian of Indian tribes, arises the principle that the power of eminent domain may be invoked on Indian tribal lands, including respondent's property, only with

---

[13] See footnote 7, *supra*. In an opinion dated May 4, 1900, Assistant Attorney General Willis Van Devanter, later an Associate Justice of this Court, ruled that 25 U.S.C. § 177 barred the Secretary of the Interior from approving a lease on the Tuscarora Reservation without authority from Congress. R. Ex. 234-38. As recently as July 9, 1958, Elmer F. Bennett, then Solicitor and now Undersecretary of the Interior Department, expressed the view that 25 U.S.C. § 233 preserved the "applicability of R.S. Sec. 2116, 25 U.S.C. 177 to Indian tribal lands in New York." R. Ex. 242.

explicit Congressional consent.[14] Stated in other words, the protections over and resultant interest in the Tuscarora Reservation which Congress has established by legislation can be eliminated or overcome solely by the express will of that body. The obvious and historic national concern for safeguarding Indian landholdings, as evidenced by Federal legal prohibitions against the alienation of tribal property, militates against the use of any but the most plain and unequivocal statutory language before condemnation of a reservation may be considered validly authorized.

Repeated court decisions illuminate the necessity for express Congressional consent to the taking of Indian tribal lands and the impropriety of seeking that consent in doubtful terms or in questionable deductions. In *Elk* v. *Wilkins*, 112 U.S. 94, 99 (1884), this Court established the basic proposition that "General Acts of Congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them."[15] This doctrine has been followed in such cases

[14] Respondent does not question that the United States has a sovereign right to sanction the condemnation of Indian tribal lands. *Cherokee Nation* v. *Southern Kansas Ry. Co.*, 135 U.S. 641 (1890). The issue in this case is whether and, if so, to what extent that undoubted right has been exercised.

[15] In the *Elk* case, an Indian sought damages from a voting registrar in Omaha for refusing to register him as a qualified voter. Under the law of Nebraska, the plaintiff was entitled to registration if he were a citizen of the United States, a status which he claimed under the Fourteenth Amendment's reference to all persons born in the United States as being citizens of the United States. This Court affirmed the judgment against the Indian plaintiff on the ground that Indians are alien dependents who "were never deemed citizens of the United States, except under explicit provisions of treaty or statute to that effect." 112 U.S. at 100.

as *McCandless* v. *United States*, 25 F. 2d 71 (C.A. 3, 1928), involving the Federal immigration laws, and *Chouteau* v. *Commissioner of Internal Revenue*, 38 F. 2d 976, 977 (C.A. 10, 1930), involving the Federal income tax. Where Congress has intended in legislation to affect Indians or their interests, the courts have held, the Indians specifically have been named or their property described. *Chouteau* v. *Commissioner of Internal Revenue*, *supra*, at p. 977; *United States* v. *2005.32 Acres of Land, etc.*, 160 F. Supp. 193, 198-200 (D.S.D., 1958); 34 Ops. Att'y. Gen. 439, 444 (1925).

In cases on the order of the instant litigation, therefore, the inquiry always is whether Congress has sufficiently and expressly made known an intent to permit the taking of Indian lands and thereby to terminate the rights and duties of the United States as trustee or guardian over tribal property. In *Nicodemus* v. *Washington Water Power Co.*, 264 F. 2d 614, 617 (C.A. 9, 1959), for example, after giving heed to the rule of *Elk* v. *Wilkins*, *supra*, that general legislation does not apply to Indians unless the intent to include them is clearly expressed, the Court of Appeals for the Ninth Circuit found in the statute there under consideration "clear, plain, unambiguous" evidence of a Congressional purpose to permit condemnation of Indian lands. Similarly, in *Seneca Nation of Indians* v. *Brucker*, 262 F. 2d 27 (C.A.D.C., 1958), the District of Columbia Court of Appeals sanctioned the appropriation of Indian tribal lands only after a finding that the intention of Congress to permit such action was perfectly obvious.[16] Accord, *United States* ex rel.

[16] Perhaps the most cogent recent judicial statement of the rule is in *United States* v. *2,005.32 Acres of Land, etc.*, 160 F. Supp.

Shoshone Indian Tribe v. *Seaton*, 248 F. 2d 154 (C.A.D.C., 1957).

The teaching of these cases is that the interest of the United States in Indian lands is so great, and the public policy of preserving and protecting the occupancy rights of Indian tribes is so important, that only the clearest manifestation of Congressional intent to terminate such interest and such policy will be respected. The ambiguous word, the doubtful implication, the unsaid phrase and the unexpressed intention will not be allowed to do duty as the will of Congress.[17]

193, 202 (D.S.D., 1958), where, in dismissing the Government's complaint in condemnation, the District Court observed:

> ". . . The Government admits that the five statutes relied upon do not specifically authorize such condemnation and the contention that these general enactments can be used by the United States, which is the guardian, to take the lands of the Indians, who are its wards, is wholly repugnant to the entire history of Congressional and judicial treatment of the Indians, and, further, is a view which is quite unacceptable to this court."

The court's conclusion in no way is weakened by the fact that, while on appeal and before argument on the merits, this case was reversed as moot on motion of the Government in view of the passage of the Act of September 2, 1958, Public Law 85-915.

[17] In terms of actual practice, Congress has recognized and established as Federal policy the principle that Indian tribal lands may be condemned only where specific permission is granted. See, for example, the statutes with respect to the U.S. Corps of Engineers collected in *United States* v. *2,005.32 Acres of Land, etc.*, *supra*, at footnote 16. Where, as here, a non-Federal instrumentality seeks to acquire property within an Indian reservation, express Congressional consent, of course, is mandatory. E.g., Act of May 17, 1957, 71 Stat. 31 (Catawba Indian Reservation); Act of May 4, 1932, 47 Stat. 146, amending the Act of February 28, 1919, 40 Stat. 1206 (Capitan Grande Indian Reservation); Act of May 10, 1926, 44 Stat. 498 (Pueblos of New Mexico). See further the Act of March 7, 1928, 45 Stat. 200, 212-13, in which

The interests of the public and of our dependent Indian tribes are too great to allow anything less than the most express and unambiguous language of Congress serve as authority for a seizure of Indian lands.

C. Relevant Canons of Statutory Construction Augment the Necessity for Explicit Congressional Consent to the Taking of a Portion of the Tuscarora Reservation.

The proposition that Federal safeguards over the Tuscarora Reservation may not be extinguished in the absence of express legislative authorization thus is not a banal generality, but rather reflects a very basic public policy, a policy of fostering care over Indian tribes in the possession of their lands. Inherent in that policy are various canons of statutory construction, each of which also serves as added support for the principle that specific Congressional consent is essential to the taking of tribal property.

Thus the fundamental rule that laws affecting Indians must be liberally construed for their benefit and protection becomes here relevant. *Choate* v. *Trapp*, 224 U.S. 665, 676 (1912); *Jones* v. *Meehan*, 175 U.S. 1, 10-11 (1899). Equally relevant is the rule that "Doubtful expressions must be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith." *Carpenter* v. *Shaw*, 280 U.S. 363, 367 (1930); *Squire* v. *Capoeman*, 351 U.S. 1, 6-7 (1956); *Winters* v. *United States*, 207 U.S. 564, 576 (1908). And since the basic problem in this case is whether the policy formulated by Congress in 25 U.S.C. § 177, and carried

---

Congress deemed its express consent essential in order for the Federal Power Commission to license a project on the Flathead Indian Reservation.

forward by 25 U.S.C. § 233, has been nullified with respect to the Tuscarora Reservation, the general principle that repeals by implication are not to be favored becomes pertinent. *Federal Trade Commission* v. *A.P.W. Paper Co.*, 328 U.S. 193, 202 (1946).

Moreover, in the context of this litigation, still another guide to statutory interpretation becomes material. In essence, the major issue in this case is whether Congress has empowered a non-Federal corporation, the New York Power Authority, to acquire full property rights and privileges in land in which the United States has an interest on behalf of the public. *Heckman* v. *United States*, 224 U.S. 413, 444-46 (1912); *Alonzo* v. *United States*, 249 F. 2d 189, 197 (C.A. 10, 1957). To obtain part of the Tuscarora Reservation, petitioner must demonstrate some relinquishment of the public interest in respondent's property, as exemplified in 25 U.S.C. §§ 177, 233, and as further manifested by the Government's duties of guardianship towards the Tuscarora Nation. Accordingly, the language of this Court in *Coosaw Mining Co.* v. *South Carolina*, 144 U.S. 550, 562 (1892), becomes of the highest relevance:

> "The doctrine is firmly established that only that which is granted in clear and explicit terms passes by a grant of property, franchises, or privileges in which the government or the public has an interest. [Citing cases.] Statutory grants, of that character, are to be construed strictly in favor of the public, and whatever is not unequivocally granted is withheld; nothing passes by mere implication. [Citing cases]."

Or, as stated in *Northern Pacific R. Co.* v. *United States*, 330 U.S. 248, 257 (1947):

> "But it is a familiar rule that where there is any doubt as to the meaning of a statute which 'operates as a grant of public property to an individual, or the relinquishment of a public interest,' the doubt should be resolved in favor of the Government and against the private claimant. *Slidell* v. *Grandjean*, 111 U.S. 412, 437."[18]

See also *Blair* v. *Chicago*, 201 U.S. 400, 472-473 (1906); *Southern R. Co.* v. *United States*, 322 U.S. 72, 76 (1944); *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 104-105 (1949); *United States* v. *Union Pacific R. Co.*, 353 U.S. 112, 116 (1957).

The relevant canons of statutory construction thus both illume and strengthen the principle that explicit Congressional consent is absolutely essential before Tuscarora lands may be condemned or otherwise appropriated. And, of course, it is within the framework of those canons and that fundamental principle of law that petitioner's contentions must be examined.

II. THE EXPRESS CONGRESSIONAL CONSENT NECESSARY TO THE TAKING OF TUSCARORA LANDS CANNOT BE FOUND IN THE NIAGARA DEVELOPMENT ACT OF 1957, A GENERAL STATUTE WHICH MENTIONS NEITHER RESPONDENT NOR ITS RESERVATION

In an attempt to escape the impact of Section 4(e) of the Federal Power Act (discussed under Point III, *infra*), petitioners place prime emphasis upon the

[18] In the words of this Court in the *Slidell* case, 111 U.S. at 438, the rule that only express grants pass a public interest "is a wise one, as it serves to defeat any purpose concealed by the skillful use of terms to accomplish something not apparent on the face of the Act, and thus sanctions only open dealings with legislative bodies." This rationale is peculiarly appropriate to the statutory problems now before the Court, since both petitioners here seek a forfeiture of the public or Federal interest in the Tuscarora Reservation not by unequivocal grant, but by mere implication.

Niagara Development Act of August 21, 1957, Public Law 85-159, 71 Stat. 401, claiming that this statute superseded the Power Act to the extent of fixing the precise facilities to be constructed for the Niagara Project. FPC Brief, pp. 28-41; SPA Brief, pp. 72-4. This argument was thoroughly reviewed and flatly rejected by the court below in the following terms (R. 427-28):

> "We have given careful consideration to the possibility that Congress, in adopting the 1957 legislation, was exercising for the United States the totality of its sovereign capacity in respect to this resource, and that the exercise of this power by Congress might be said to be without limitations. This might be in furtherance of a policy of Congress so to govern disposal of rights to develop hydroelectric power that the development would be in the manner the Congress, not an administrative agency or the courts, might select. [Footnote omitted.] Accordingly it might be argued that Congress in the 1957 Act made provision, by a single stroke, for the immediate development by the Power Authority of one of the nation's greatest resources, with all the concomitant factors of necessary works; seizure of property, and conditions of operation. * * *
>
> "We have considered that approach, but even as we have considered it we must reject it, for we find no escape from the language of the 1957 Act. As we have already pointed out, Congress did not issue a license; it authorized and directed its established agency to issue the license, and the Commission was ordered to include not only specified conditions but also 'those * * * required under the terms of the Federal Power Act.'"

Nothing said to this Court by petitioners in any way detracts from the force of the foregoing conclusion.

As a mere reading of the statute readily reveals, the Act of August 21, 1957, reflects a legislative policy decision designed to settle the seven-year controversy between public and private power advocates over development on the Niagara River. See Statement, pp. 7-8, *supra*. In Section 1(a) of the Act, Congress implemented a 1950 Treaty with Canada (1 U.S.T. 694) by directing the Commission to issue a license to the New York Power Authority "for the construction and operation of a power project with capacity to utilize all of the United States share of the water of the Niagara River permitted to be used by international agreement." In Section 1(b) of the Act, Congress further directed the Commission to impose seven express conditions on the license "in addition to those deemed necessary and required under the terms of the Federal Power Act"—the conditions so specified being the concessions to private power companies, neighboring States, and other economic and political interests deemed essential to passage of the legislation. With respect to all other features of the Niagara Project, Congress directed the Commission "to issue a license pursuant to the provisions of the Federal Power Act. . . ." S. Rep. No. 589, 85th Cong., 1st Sess. (1957), p. 1; H. Rep. No. 862, 85th Cong., 1st Sess. (1957), p. 1.

The 1957 Act thus superseded the Federal Power Act in the sense that the statute deprived the Commission of any discretion in selecting a licensee. The 1957 Act also prescribed conditions, not here relevant, in addition to or as substitutes for conditions specified in the Federal Power Act. The 1957 Act, however, did not designate the location of the power project, describe the nature of the project works or otherwise

approve any particular engineering plan for power development, all technical matters within the special competence of the Commission to which the provisions of the Federal Power Act remained applicable.[19]

Petitioners' contention that Public Law 85-159 supplanted the Federal Power Act is further weakened, of course, by the fact that the Power Authority applied for its license under Section 4(e) of that Act (R. 391), and the license was issued by the Commission pursuant to Section 4(e). R. 404. The Government may not here impeach the very order it asks the Court to sustain. Similarly, petitioners' argument is undercut by the fact that, if Public Law 85-159 is construed to allow the Power Authority to condemn an Indian reservation, then the statute must also have empowered petitioner to condemn any Federal reservation.[20] There

---

[19] In urging that Congress fixed the character of Niagara Project facilities, the Government seeks in this case to equate the Power Authority to the Corps of Engineers. FPC Brief, pp. 29-30. This analogy, of course, cannot stand up under scrutiny, since the substantive differences between a New York corporation and an arm of the United States Government are legion. Suffice it to say in this instance that whatever the legislative practice and judicial approach may be with respect to projects of the Corps, which are Federal works directly authorized by Congress, that practice and that approach have no bearing upon the Act of August 21, 1957, where Congress merely provided for the issuance of a license by the Commission to a State corporation for a non-Federal project.

[20] Tribal lands within Indian reservations, national forests, military reservations, and other lands or interests in lands owned by the United States generally are accorded the same treatment under the Federal Power Act, so the loss of protections over respondent's property logically would expose all such reservations to condemnation. Indeed, under petitioners' theory that the 1957 Act subordinated every public use to the Niagara Project, the Commission could have been obliged to issue a license even on Federal property, such as a national monument, which Congress specifically has removed from its licensing jurisdiction. 16 U.S.C. § 796(2).

is no language on the face or in the legislative history of the 1957 Act, however, indicating that Congress intended so to abdicate to a State corporation control over property in which the United States has an interest..

But the basic flaw in petitioners' thesis that Public Law 85-159 superseded the Federal Power Act is that the Act of August 21, 1957, cannot qualify under any circumstances as the express authority from Congress necessary for the taking of Indian tribal lands.

A. The Required Explicit Congressional Consent to the Acquisition of Tuscarora Lands Does Not Appear on the Face or in the Legislative History of Public Law 85-159.

Congress in the Act of August 21, 1957, quite clearly did not expressly authorize or otherwise consent to the taking of respondent's tribal property for power project purposes. To paraphrase the court below (265 F. 2d at p. 340), Congress did no more in the 1957 Act than name the licensee, describe the scope of the license and specify seven conditions to be included in the license by the issuing Commission. Not the slightest reference to or mention of the Tuscarora Indian Nation or the Tuscarora Reservation appears at any place on the face of the statute. And, as previously noted, not only was no attempt made in Public Law 85-159 to describe the lands necessary for the Niagara Project, but also the enactment unmistakably contemplated that the property to be acquired would be designated and approved under the terms of the Federal Power Act.

Hence the Act of August 21, 1957, does not evidence an express legislative purpose to forfeit the interest of the United States in the Tuscarora Reservation, or

in any way "clearly manifest" a Congressional intent to include Indian lands within the scope of the statute, as required by *Elk* v. *Wilkins*, 112 U.S. 94, 99 (1884). To find authority for the condemnation of respondent's property on such a record would be to disregard every relevant canon of statutory construction pronounced by this Court, including the rules: (a) that laws affecting Indians must be liberally construed for their benefit and protection, set forth in *Choate* v. *Trapp*, 224 U.S. 665, 675 (1912); (b) that doubtful expressions, if any, must be resolved in favor of the Indians, set forth in *Carpenter* v. *Shaw*, 280 U.S. 363, 367 (1930); (c) that repeals by implication are not favored, set forth in *Federal Trade Commission* v. *A.P.W. Paper Co.*, 328 U.S. 193, 202 (1946); and (d) that only express statutory grants will serve to relinquish a public interest, set forth in *Coosaw Mining Co.* v. *South Carolina*, 144 U.S. 550, 562 (1892). Indeed, to sanction a taking of Tuscarora lands on the basis of Public Law 85-159 would be to give effect to a "purpose concealed by the skillful use of terms, to accomplish something not apparent on the face of the Act," and thus would defeat the principle of "open dealing with legislative bodies" laid down by the Court in *Slidell* v. *Grandjean*, 111 U.S. 412, 438 (1884).

Moreover, the legislative history of the Act of August 21, 1957, conclusively demonstrates that Congress had no awareness or knowledge that part of the Tuscarora Reservation might be desired for the Niagara Project. The debates in the House of Representatives and in the Senate on H.R. 8643, which eventually became Public Law 85-159, contain not one word about respondent or respondent's lands. 103 CONG. REC. 13194-211, 13364-5, 14437-56 (1957). The Reports of the House

and Senate Committees on Public Works on H.R. 8643 and its companion bill, S. 2406, respectively, make not even the vaguest reference to the remotest possibility that Indian lands would be covered by the project. H. Rep. No. 862, 85th Cong., 1st Sess. (1957); S. Rep. No. 539, 85th Cong., 1st Sess. (1957).[21] And, finally, not a single indication that Tuscarora lands might be included in any plans for the project was given at any of the Committee hearings.

After the most exhaustive of searches, petitioners before this Court can point (FPC Brief, pp. 32-3) to only one obscure reference to the Tuscarora Reservation in seven years of hearings on the Niagara Project —a statement in one of the alternative plans proposed by the Power Authority prior to 1956 that a reservoir of 41,000 acre-feet could be constructed covering 1,700 acres "just north of Wittmer [Whitmer] Road between Military Road and the Tuscarora Indian Reservation,"[22] i.e., entirely outside the bounds of respondent's lands. Since the storage reservoir was increased to 60,000 acre-feet after the Schoellkopf disaster in 1956, the Government's argument runs, it can be inferred that Congress knew respondent's lands then would be needed. Even assuming that knowledge of a statement buried deep in 1955 Hearings may be imputed to Congress in 1957—a dubious proposition at best—petitioners' conclusion still does not logically follow. In the absence of information to the contrary,

[21] "There is no mention of Indian land in the committee reports, the debates, or the directive statute; the Indians do not appear to have testified at the hearings; and in the plan considered by Congress there was no apparent necessity for the taking of Indian land." Note, 72 HARV. L. REV. 1372, 1373-4 (1959).

[22] Hearings on Niagara Power Development before the House Committee on Public Works, 84th Cong., 1st Sess., p. 132.

and given the known Federal interest in tribal property, Congress more likely concluded in this situation that other land was available and the Tuscarora Reservation thus would remain untouched.[23]

The legislative history of the Niagara Development Act of 1957, therefore, reveals not even a "shadow of a shade of an idea," cf. *Atlantic Works* v. *Brady*, 107 U.S. 192, 200 (1883), that the Niagara Project in any way would affect the Tuscarora Indian Reservation.[24]

---

[23] Petitioners' handling of legislative materials in this case presents an interesting study in value judgments. For the Government, a written statement in 1955 that the storage reservoir would be *off* the Tuscarora Reservation leads to a presumption in 1957 that Congress knew the reservoir would be *on* that Reservation. FPC Brief, p. 49. For both petitioners, on the other hand, the uncontradicted testimony of a witness from the Corps of Engineers in 1956 to the effect that the Niagara Mohawk Company owned all the land needed for the Niagara Project is worthy of no consideration. FPC Brief, pp. 50-51; SPA Brief, p. 78; see footnote 24, *infra*.

[24] If anything, the legislative history of the 1957 Act affirmatively demonstrates that Congress did not intend expressly or by implication to sanction the alienation of any part of the Tuscarora Reservation. In 1956, for example, a representative of the Corps of Engineers gave testimony, never contradicted, that the Niagara Mohawk Company owned all the property needed for the project. Hearings on Niagara Power Development before the House Committee on Public Works, 84th Cong., 2d Sess. (1956), p. 12. Moreover, the next witness from the Power Authority did nothing to change that record. *Id.* at pp. 23, 25 and 27-28.

In addition, the House Committee report in 1957 speaks of a "reservoir with surface area of 850 acres and a storage capacity of 22,000 acre-feet" (H. Rep. No. 862, 85th Cong., 1st Sess., p. 6), while the Senate Committee report mentions "a storage reservoir . . . with a capacity of about 30,000 acre-feet." S. Rep. No. 539, 85th Cong., 1st Sess. (1957), p. 5. A project so constructed could not have used Tuscarora land. R. 291.

Finally, Senator Chavez, Chairman of the Committee on Public Works and one of the leading proponents of the bill, declared during the Senate debate on H.R. 8643 that "No dams or pro-

Under such circumstances, the search for Congressional consent appropriately may be limited to the words of the statute itself. See *Carpenters' Union* v. *Labor Board*, 357 U.S. 93, 100 (1958); *Dameron* v. *Brodhead*, 345 U.S. 322, 326 (1953). Here, as in the *Dameron* case, the Court is "shown that nothing indicates that a straightforward application of the language as written would violate or affect the clear purpose of the enactment." And the language of Public Law 85-159, as confirmed by the legislative history, in no way manifests the express Congressional consent requisite to the acquisition of respondent's lands.

B. The Necessary Intent of Congress to Authorize the Alienation of Tuscarora Lands Cannot Be Implied From the Nature or Scope of the Niagara Project

Petitioners do not seriously attempt to derive the requisite Congressional consent to the taking of respondent's property from the express words of Public Law 85-159 or from any express statement in the legislative history of the 1957 Act. The utter absence of such language precludes any conclusion that Congress specifically directed or authorized the utilization of Tuscorara lands for the Niagara Project. Petitioners' emphasis, rather, centers on the contention, adopted by the Court of Appeals for the Second Circuit in *Tuscarora Nation of Indians* v. *Power Authority*, 257 F. 2d 885 (C.A. 2, 1958), that an "implied" intent to allow the condemnation of a portion of the Tuscarora Reservation can be "inferred" from the 1957 statute upon consideration of the extensive nature of the project and the proximity of the required reservoir

visions for storage of water are necessary." 103 CONG. REC. 14438 (1957). Although Senator Chavez erred, there is no indication that this statement ever was corrected.

to the Indians' lands. Or, as stated by the Solicitor General (FPC Brief, p. 53), the "necessary Congressional authorization" can be supplied from two allegedly demonstrable factors: (1) "the necessity to use Indian lands for a project specifically authorized by Congress"; and (2) "the presumption that Congress knew of Indian lands in the vicinity."

As has heretofore been demonstrated, a finding of the requisite Congressional consent "by implication" violates every relevant principle of statutory construction. Apart from the rule that general acts of Congress do not affect Indians unless an intent to include them is clearly manifest and the further rule that laws affecting Indians must be liberally interpreted for their benefit and protection, the principle of refusing to read implications into otherwise clear statutes where a non-governmental party seeks to acquire land in which the United States has an interest outlaws this effort to establish "consent by implication." See *Coosaw Mining Co.* v. *South Carolina*, 144 U.S. 550 (1892), and *Northern Pacific R. Co.* v. *United States*, 330 U.S. 248, 257 (1947), discussed at pp. 36-7, *supra*.

Moreover, the three cases cited by petitioners (FPC Brief, pp. 53-5) in support of the theory of "consent by implication" are inapposite.[25] *Henkel* v. *United*

[25] In addition to the cases discussed in the text, the Government also cites (Brief, p. 57) a series of decisions to the effect that the power of eminent domain "extends to property already devoted to an equivalent public use if the authorized project requires, for its execution, the taking of such property." These cases, however, all relate to land originally devoted to non-Federal public uses, and the doctrine therein expressed never has been invoked where, as here, a State agency seeks to acquire lands in which the United States has an interest. *Cf. United States* v. *Carmack*, 329 U.S. 230, 243 at fn. 13 (1946). For this reason, as well as the principles of

States, 237 U.S. 43 (1915), for example, involved not the condemnation of tribal land, but rather involved the voluntary sale by an Indian family to the United States of property to which the Indians had no legal right, but which they used and occupied under an agreement which expressly reserved to the Federal Government a power to acquire the land for certain public improvements. Unlike the Act of August 21, 1957, which refers to no land in particular, the statutes under consideration in *Spalding* v. *Chandler*, 160 U.S. 394 (1896) and *Missouri, Kansas & Texas Ry. Co.* v. *Roberts*, 152 U.S. 114 (1894) constituted specific grants by Congress to third parties of specifically defined territory held in the name of the United States.[26]

Finally, even if it were possible to authorize the alienation of Indian lands by implication, that implication cannot properly be drawn on the facts of this case. In other words, the two elements which the Solicitor

---

statutory construction previously analyzed, the cases are inapplicable to Indian lands.

The Power Authority (Brief, pp. 81-2) relies on *Barker* v. *Harvey*, 181 U.S. 481 (1901) as authority for the proposition that general acts of Congress will be held to apply to Indians. As this Court pointed out (181 U.S. at p. 492), however, Section 16 of the law there under consideration specifically referred to Indians so a legislative intent to include them within its scope was manifest.

[26] The *Spalding* case is distinguishable on two further factual grounds: (a) the exclusion of Indian lands from the statute there under consideration would have nullified the entire grant to the State of Michigan, whereas in this case the Commission found as a fact that "other lands are available for reservoir use" (R. 395); and (b) Congress was on notice prior to passage of the statute there involved that the canal right-of-way would run through Indian lands, whereas in this case the legislative history of the 1957 Act shows unmistakably that Congress had no idea Indian lands would be desired for the Niagara Project.

General concedes (FPC Brief, p. 53) are together essential to "consent by implication" actually do not here exist.

1. *Tuscarora lands were not necessary for the Niagara Project as of August 21, 1957.* The heart of petitioners' argument with respect to implied consent is that in August of 1957, when Public Law 85-159 was enacted, Congress was aware that property within the Tuscarora Reservation would be required in order to build the Niagara Project to the planned extent. No such knowledge fairly can be attributed to Congress for the very simple reason that respondent's lands were not so needed at the time the 1957 Act came into being. As the General Manager of the Power Authority subsequently testified (R. 270, 274), the boundaries of the storage reservoir had not then even been determined. See Statement, p. 10, fn. 4, *supra*. Indeed, the plain and unvarnished fact in this case is that on January 30, 1958, the Commission in issuing a license to the Power Authority still could find that "other lands are available for reservoir use if the Applicant [petitioner herein] is unable to acquire the Indian lands, although alternative lands may be more expensive." R. 395.

During the hearings before the Commission following remand of this case by the court below, the Power Authority submitted exhibits and presented testimony purporting to demonstrate that respondent's property is essential to the Niagara Project.[27] The most that

[27] The Tuscarora Nation objected (R. 24) to this line of proof as outside the scope of the order on remand and the Commission's own Notice of Further Hearing (see Statement, pp. 14-15, *supra*), but the objection was overruled by the presiding officer. R. 24, 41-2, 380. Respondent then filed an appeal from this ruling with

this evidence shows, however, is that as of December, 1958, sixteen months after passage of Public Law 85-159, locating the storage reservoir wholly off the Tuscarora Reservation would cause petitioner considerable expense.[28] What happened in the interim is that after passage of the Act of August 21, 1957, and notwithstanding the pendency of this litigation, the Power Authority abandoned all alternatives,[29] and proceeded on the single-minded assumption that it could and would acquire Tuscarora lands. R. 275-76.

---

the Commission pursuant to Rule 1.28(a) of the Commission's Rules of Practice and Procedure (R. 43-6), but no action ever was taken on that appeal. In view of the favorable decisions of the Commission and the court below, respondent has not been in a position further to contest the improper admission of such evidence.

[28] In its Opinion and Finding of February 2, 1959, the Commission still did not declare that the storage reservoir could not be constructed to full capacity off respondent's property, but only that such a course would cause delay, disruption and expense. R. 487. With respect to this possibility, the court below correctly observed (R. 431):

> "We fail to find anywhere an inclination of the Congress to save costs to its sole licensee for this enormous power project at the expense of Indians living on an Indian reservation."

[29] When mapping "alternative reservoir sites" in November, 1958, for example, petitioner treated the area outside respondent's reservation on which it already was working as a constant and made no allowance for raising the reservoir dikes thereon. R. Ex. 15-22. The basic excuse for not raising the reservoir dikes, though, was merely the fact that the machinery ordered by the Power Authority after January, 1958, would work less efficiently under such circumstances. Eventually, in applying on March 2, 1959, for an amended license, petitioner conceded that the machinery could be modified to handle a greater drawdown. Presumably, machinery could have been purchased at the very outset which would have achieved maximum capacity through a higher reservoir on a smaller land area wholly off the Tuscarora Reservation. R. 231.

To undo, modify or shift in 1959 what was improvidently commenced in 1957 undoubtedly will cost money and cause disruption.[30] The Power Authority, however, may not in good conscience profit from its own mistakes, or by unilateral acts place itself in a position more advantageous than it otherwise would occupy. According to the Commission, the Authority was not entitled to a finding on January 30, 1958, that Tuscarora lands were required for the Niagara Project and, since the legal relationships between the parties remain unchanged, it is no more entitled to such a finding today. To reach back a 1959 conclusion into the mind of Congress as constituted in 1957, to find a 1957 intent on the basis of 1959 facts, in short to inject an after-acquired necessity retroactively into an earlier Congressional act, is to pervert the theory of "consent by implication" beyond all bounds of reason.

2. *The legislative history of the 1957 Act provides no basis for a presumption that Congress knew Tuscarora lands might be included within the Niagara Project.* Petitioners do not claim that Congress expressly was advised that respondent's property might be needed for the Niagara Project, but rather assert that such knowledge may be imputed to Congress from

---

[30] As pointed out by Commissioner Hussey, concurring in the denial of the Power Authority's petition for rehearing (R. 510-11), petitioners still have not proved that 1383 acres or any lesser amount of Tuscarora land is absolutely necessary for the project to reach maximum capacity. If additional land outside the Tuscarora Reservation were used in conjunction with the higher dikes now planned, a 60,000 acre-feet storage reservoir wholly off respondent's property seems entirely feasible. The facts in this regard could have been made known, of course, if the Commission had scheduled the hearing on the Power Authority's application for an amended license which it noticed for hearing more than eight months ago. 24 *Fed. Reg.* 1711; see Statement, p. 16, *supra*.

certain general information about the local terrain. FPC Brief, pp. 48-50; SPA Brief, pp. 33-38. Apart from the obscure reference to the Tuscarora Reservation previously discussed (pp. 43-4, *supra*), these materials consist of (a) a "background" map referred to by the Corps of Engineers in 1956, (b) the testimony of a Seneca Indian in 1951, and (c) two brochures allegedly made a part of Committee records in 1957.[31] Except possibly to a skilled cartographer residing on the Niagara Frontier, none of these items in fact gives the slightest indication that respondent's property might be included within the project.

(a) The Government's primary reliance (Brief, pp. 48-9) upon a general survey map which was not even made a part of the legislative record hardly needs comment. Attributing to Congress the knowledge that Tuscarora lands would be covered by a storage reservoir on the basis of an unsubmitted document which, without specifying the project location, at most places the reservation in the same general area, goes far to show that Congress in fact had no idea respondent's

[31] The Government (Brief, p. 50) also refers to the fact that the readers of a Niagara Falls newspaper plus "responsible members of the Tuscarora Nation" were advised in 1957 that Indian lands were desired for the storage reservoir. The relevance of this information to what members of Congress may be presumed to know is not explained. Indeed, the very fact that respondent's members did not protest when a map was distributed among them in 1957 demonstrates that even those individuals directly familiar with the terrain did not conclude at the time that the Power Authority really intended to appropriate their lands. The "silence of the respondent Nation," to which the Solicitor General refers (FPC Brief, p. 50), only supports the thesis that the intent and the words of a statute "are to be taken in the sense in which they will be understood by that public in which they are to take effect." *United States* v. *Isham*, 17 Wall. (U.S.) 496, 504 (1873); *United States* v. *Leslie Salt Co.*, 350 U.S. 383, 397 (1956).

property might become involved. Even the most astute member of Congress cannot be expected to synthesize such amorphous information.

(b) The testimony of a Seneca Indian, so heavily stressed by petitioners (FPC Brief, p. 52; SPA Brief, pp. 35-7, 76), was nothing more than another recitation of a 140-year old land claim to the effect that the Seneca Nation owns a "Mile Strip" along the Niagara River. The indulgent attitude of individual members of Congress in 1951 to the stale claims of a Seneca Indian cannot be translated into an intent on the part of Congress six years later to authorize a taking of lands unquestionably owned by the Tuscarora Nation.[32]

(c) Finally, the two brochures introduced by the Power Authority as Exhibits 191 and 218 during the hearings before the Commission mention neither the Tuscarora Nation nor the Tuscarora Reservation, and thus in no way identify respondent's lands with the Niagara Project. R. 151-52, 268-70; R. Ex. 35-44, 131-49. The map in Exhibit 191 (R. Ex. 42), for example, does not show property lines, and the Authority's own witness conceded that he could not have located the Tuscarora Reservation in the area of the storage reservoir prior to the time he began work on the project and thus became intimate with local geography. R. 157-58; see also R. 268-70. Moreover, another witness for the Power Authority was unwilling to testify that any member of Congress ever had read the brochures. R. 270-74.

---

[32] Sections 3(2) and 4(e) of the Federal Power Act protect Indian reservations, such as respondent's property, not lands subject to Indian claims regardless of their validity.

The salient fact, however, is that Exhibits 191 and 218 actually form no part of the legislative history of the Act of August 21, 1957. Although allegedly "introduced into evidence" (SPA Brief, p. 33), the report designated as Exhibit 191 at the 1958 Commission hearing in fact is not listed as an exhibit in the table of contents and, as a study of the printed text reveals, is nowhere made a part of the official transcript of the 1957 hearings published by the Senate Committee on Public Works.[33] Hearings before a Subcommittee of the Senate Committee on Public Works, 85th Cong., 1st Sess., on Niagara Power Development, dated April 10-13, 1957. Similarly, although allegedly submitted to the House Committee on Public Works (FPC Brief, p. 35), Exhibit 218 in fact is dated eight days *after* H.R. 8643, the bill which eventually became Public Law 85-159, was finally reported by that Committee (103 CONG. REC. D446), and was distributed two days *after* the House Committee report was printed.[34] H. Rep. No. 862, 85th Cong., 1st Sess., dated July 23, 1957, p. 1; R. Ex. 134, 151. The fact that the Power Authority's brochures may have been privately cir-

[33] Petitioners seek to remedy this fatal deficiency with a 1958 certificate from Senator Robert S. Kerr to the effect that Exhibit 191 was made a part of the record before his Subcommittee. R. 383-85. Senator Kerr's certificate, to which respondent made a timely objection (R. 384), of course, is not admissible to vary legislative history or to serve as legislative history. *Ramspeck* v. *Federal Trial Examiners*, 345 U.S. 128, 143 at fn. 9 (1953).

[34] Originally, the Power Authority maintained that Exhibit 218 was submitted to the House Committee during the hearing in 1957 on the Niagara Project. R. 386-87. The facts are that the House Committee on Public Works did not hold any hearings in 1957 on bills relating to development of the Niagara River. H. Rep. No. 862, 85th Cong., 1st Sess. (1957), p. 3. Now petitioner claims only that the brochure still is in the files of the Committee. SPA Brief, p. 38.

culated to individual members of Congress does not make these documents any part of the legislative history of the 1957 Act. *McCaughn* v. *Hershey Chocolate Co.*, 283 U.S. 488, 493-4 (1931); *State Wholesale Grocers* v. *Great Atlantic & Pac. Tea Co.*, 154 F. Supp. 471, 484-5 (D., Ill., 1957); *National School of Aeronautics* v. *United States*, 142 F. Supp. 933, 938 (C. Cls., 1956); *United States* v. *St. Paul Mercury Indemnity Co.*, 133 F. Supp. 726, 737 (D., Nebr., 1955); *Blackfeet & Gros Ventre Tribes* v. *United States*, 119 F. Supp. 161, 167 (C. Cls., 1954).

Such is the stuff of which petitioners' argument on "consent by implication" is made. A finding on this flimsy evidence that Congress authorized the taking of any portion of the Tuscarora Reservation would strip all meaning from the doctrine that legislative consent is essential to the alienation of Indian tribal lands.

III. THE TUSCARORA RESERVATION IS AN INDIAN RESERVATION WITHIN THE MEANING OF SECTIONS 3(2) AND 4(e) OF THE FEDERAL POWER ACT AND, THEREFORE, MAY NOT BE LICENSED BY THE COMMISSION FOR USE IN THE NIAGARA PROJECT IN THE ABSENCE OF THE FINDING REQUIRED BY SECTION 4(e)

The rule of law is clear—to recapitulate briefly two fundamental legal principles involved in this case—that the United States exercises paramount control over the disposition of Indian lands and that some form of express consent by the United States is essential before respondent's property may be condemned or otherwise alienated. Point I, pp. 23-37, *supra*. As has been demonstrated, and as the court below concluded (R. 427), Congress in the Act of August 21, 1957, 71 Stat. 401, did not so authorize the taking of a portion of the Tuscarora Reservation for use in the

Niagara Project. The most important question which remains, therefore, is whether the necessary consent can be found, as petitioners claim, in the Federal Power Act, 16 U.S.C. § 791a *et seq.*

The required consent of the Federal Government to the licensing of Indian lands for project purposes, of course, cannot be spelled out from general provisions of this statute for a reason heretofore explored in detail—the time-honored and now well-settled doctrine that general acts of Congress do not apply to Indians "unless so expressed as to clearly manifest an intention to include them." *Elk* v. *Wilkins*, 112 U.S. 94, 99 (1884); see pp. 32-4, *supra*. If at all, therefore, the required consent must be found in Sections 3(2) and 10(e) of the Act, 16 U.S.C. §§ 796(2) and 803(e), which specifically refer to "tribal lands embraced within Indian reservations," and in Section 4(e), 16 U.S.C. § 797(e), which allows the licensing of projects within such reservations provided certain findings can be made and other conditions be satisfied.

Petitioners urge, though, that the Tuscarora Reservation is not an Indian reservation within the meaning of Sections 3(2), 4(e) and 10(e) of the Act. FPC Brief, pp. 58-73; SPA Brief pp. 47-71. Assuming, *arguendo*, the validity of this contention, then the Federal Power Act does not furnish authority under any circumstances for the licensing of respondent's property. In brief, if the Tuscarora Reservation is not under the coverage of the Federal Power Act to the extent of gaining the benefits of Sections 3(2), 4(e) and 10(e), then the Tuscarora Reservation is not by these very sections placed within the scope of the Federal Power Act to the extent of losing the benefits of 25 U.S.C. §§ 177 and 233. Stated another way,

the express consent of the United States so essential to the lawful condemnation or other alienation of Indian tribal lands cannot logically be found in statutory provisions which are said at the very same time not to apply to such Indian tribal lands.

The basic flaw in petitioners' argument, however, is that the Tuscarora Reservation in law and fact is an Indian reservation within the meaning of Section 3(2) of the Federal Power Act, and thus is fully protected by that portion of Section 4(e) which prohibits the licensing of tribal lands by the Commission in the absence, as in this case, of a finding that "the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired." 16 U.S.C. § 797(e).

A. Respondent's Lands Are Tribal Lands Within an Indian Reservation Subject to the Supervision of the Secretary of the Interior

Section 3(2) of the Federal Power Act speaks of "tribal lands embraced within Indian reservations." 16 U.S.C. § 796(2). The Court of Appeals ruled in this case that the "land here in dispute is indubitably 'tribal lands embraced within Indian reservations' within the usual meaning of that phrase." R. 429. As the following discussion will demonstrate, the court below undoubtedly was correct.

1. *Reservation Status*—The fact that the Tuscarora Reservation is an Indian reservation can hardly be disputed.[35] Indeed, petitioners do not question this obvious truth.

[35] R. 365-66; R. Ex. 234-38, 242; see also "Report of the Commissioner of Indian Affairs to the Secretary of the Interior for the Year 1877" (G.P.O., 1877), at p. 167.

2. *Tribal Status*—The fact that the Tuscarora Reservation consists wholly of tribal land is supported by every relevant legal authority as well as by all of the evidence in this case, and thus also should be beyond debate. Congress and the Executive Departments, for example, repeatedly have recognized tribal title to the entire territory within the exterior boundaries of respondent's reservation. House Doc. No. 1590, 63d Cong., 3d Sess., 1915, pp. 12-13; quoted in Cohen, *Handbook of Federal Indian Law* (G.P.O., 4th Ed., 1945), p. 423; "General Data Concerning Indian Reservations", prepared under the direction of the Commissioner of Indian Affairs, U.S. Department of the Interior, dated October 15, 1929 (G.P.O., 1930), at p. 10. Indeed, as recently as January 4, 1954, the Department of the Interior advised Congress that the "dominant title" to the Tuscarora Reservation still is in the Nation. R. 366.

Moreover, the Power Authority's own exhibits in this case clearly show that the Tuscarora Reservation was granted to, and acquired in the name of, the Tuscarora Nation. R. Ex. 165-70, 197-202. The deed from Secretary of War Dearborn runs to the "Tuscarora Nation of Indians", and is so recorded (R. Ex. 196-200); there is nothing in the record to show any subsequent change of ownership. Finally, in view of the application to respondent's property of 25 U.S.C. §§ 177 and 233 (see Point I, *supra*), the tribe is barred as a matter of law from alienating its lands without the consent of the United States—which consent has never been granted—and thus any purported conveyance of its interests in the Tuscarora Reservation would be invalid. *Tuscarora Nation of Indians* v. *Power Authority*, 257 F. 2d 885, 888-91 (C.A. 2, 1958).

Notwithstanding the overwhelming weight of law and evidence to the contrary, petitioners contend that a substantial portion of the Tuscarora Reservation has been "allocated" to individual Indians and thus no longer constitutes "tribal land."[36] FPC Brief, pp. 12, 72; SPA Brief, pp. 25-29, 59-60. What has happened, of course, is that the Nation has assigned use-rights in its property to its members in accordance with tribal custom[37]—an act which no more diminishes respondent's ownership of the assigned territory than would an ordinary lease or permit. Even the New York courts recognize that the Nation possesses a compensable interest in assigned lands (*Dixon* v. *State*; 4 Misc. 2d 76 (1956)), and, as previously noted, the controlling Federal law flatly bars respondent from

---

[36] The Power Authority concedes that the "Nation is still the holder of the record title" (Brief, p. 29), but nonetheless contends that "the individual allottees own complete property rights. . . ." *Ibid.* The very evidence cited by petitioner, however, proves that respondent retains substantial property interests in land assigned to individual Tuscarora Indians. R. 136; N.Y. Pub. Serv. Doc. No. 18, 875-1958, referred to in SPA Brief, at pp. 27-28. Furthermore, it is interesting to compare the Power Authority's thesis that respondent's possession of record title does not mean that its property is tribal land with petitioner's other argument that the holding of bare legal title to Indian reservations by the United States means that this territory is Federal property for purposes of Sections 3(2) and 4(e) of the Federal Power Act.

[37] Petitioners are aware that the Tuscarora Reservation is not subject to allotment and in fact has not been allotted under the General Allotment Act of February 8, 1887, 24 Stat. 388, as amended, 25 U.S.C. § 331 *et seq.* FPC Brief, p. 72; SPA Brief, p. 25. Under the 1887 Act, tribal lands divided in severalty become the property of the individual allottee and the tribal estate is terminated. Allottees on Indian reservations in the State of New York, on the other hand, possess mere use-rights on lands still held in common ownership and would be called "assignees" elsewhere in the country.

disposing of its title. 25 U.S.C. §§ 177 and 233; 58 Decisions of the Interior Department 218 (1942). Accordingly, the Tuscarora Reservation cannot contain anything but tribal land.

3. *Guardianship Status*—Lastly, the fact that the Tuscarora Reservation still is under the supervision of the Federal Government is not open to serious challenge.[38] The court below so ruled (R. 423-24), as did the Court of Appeals for the Second Circuit in related litigation. *Tuscarora Nation of Indians* v. *Power Authority*, 257 F. 2d 885, 888-91 (1958); accord, *United States* v. *Forness*, 125 F. 2d 928 (C.A. 2, 1942). The New York Court of Appeals has reached the same conclusion. *People* ex rel. *Cusick* v. *Daly*, 212 N.Y. 183 (1914); *Mulkins* v. *Snow*, 232 N.Y. 47 (1921). And recent commentators unanimously are in accord. Gunther, *Governmental Power and New York Indian Lands—A Reassessment of a Persistent Problem in Federal-State Relations*, 8 BUFFALO L. REV. 1 (1958); Note, 72 HARV. L. REV. 1372 (1959); *N.Y. Special Legislative Committee on the Revision and Simplification of the Constitution*, Leg. Doc. (1958) No. 57, Ch. V, pp. 33-42 (reproduced in part at R. 377-80).

Furthermore, the record in this case shows that the Department of the Interior in fact has exercised guardianship over the Tuscarora Reservation in the name of the United States on repeated occasions. In an

[38] In denying the Tuscarora Nation's application for rehearing of the original license order, the Commission expressed the view that respondent's "lands are not within an Indian reservation under supervision of the Secretary of the Interior. . . ." R. 413. The court below characterized this statement as "patently in error." R. 424. The Government apparently has abandoned the contention in this Court, and only the Power Authority remains unconvinced. SPA Brief, pp. 30-32, 60-64.

Opinion dated May 4, 1900 (R. Ex. 234-38), for example, Assistant Attorney General Willis Van Devanter—later an Associate Justice of this Court known for his learned opinions in the field of Indian law—ruled that respondent's lands could not be sold, leased or otherwise alienated without specific permission from Congress, and since that date the Secretary of the Interior consistently has refused to approve leases not so authorized. R. Ex. 239-41. As recently as April 17, 1958, the Commissioner of Indian Affairs held the contract between the Tuscarora Nation and its attorneys subject to the protective provisions of R.S. 2103, 25 U.S.C. § 81, governing agreements by Indian tribes "relative to their lands. . . ." R. 333-34. And in a letter dated July 9, 1958, the Solicitor (now Undersecretary) of the Interior Department advised respondent's counsel that "we recognize that certain Federal responsibilities for Indians in New York still do exist." R. Ex. 242.

In response to H. Con. Res. 108 of the 83d Congress (R. Ex. 243), the Department of the Interior in 1954 actually submitted draft legislation to Congress aimed at terminating the guardianship of the United States over the Tuscarora Nation, including capitalization of the annual annuity paid to respondent under the Treaty of November 11, 1794, 7 Stat. 44.[39] R. 358-70; 100 Cong.

[39] During recent years Congress has approved a number of statutes ending guardianship for various Indian tribes. See, for example, the Act of August 13, 1954, 68 Stat. 718, 25 U.S.C. § 564 *et seq.* (Klamath); the Act of August 13, 1954, 68 Stat. 724, 25 U.S.C. § 691 *et seq.* (Western Oregon); the Act of September 1, 1954, 68 Stat. 1099, 25 U.S.C. § 741 *et seq.* (Paiute); the Act of August 1, 1956, 70 Stat. 893, 25 U.S.C. § 791 *et seq.* (Wyandotte); the Act of August 2, 1956, 70 Stat. 937, 25 U.S.C. § 821 *et seq.* (Peoria); the Act of September 21, 1959, Public Law 86-322

REC. 624, 1083, 1174 (1954). Congress, however, did not even seriously consider the proposal (Original Transcript, p. 5362). Yet only Congress may declare when the special relationship between Indian tribes and the Federal Government shall cease.[40] *Winton* v. *Amos*, 255 U.S. 373, 391-92 (1921); *United States* v. *Nice*, 241 U.S. 591, 598 (1916); *Tiger* v. *Western Investment Co.*, 221 U.S. 286, 315 (1911); *Dewey County* v. *United States*, 26 F. 2d 434, 435 (C.A. 8, 1928). The Tuscarora Reservation, therefore, still remains subject to the supervision of the Federal Government.

B. Tuscarora Lands Owned in Fee by the Nation, Subject to a Restriction on Alienation Without the Consent of the United States, Enjoy the Same Protections and Are Entitled to the Same Treatment Under the Federal Power Act as Any Other Tribal Lands Embraced Within an Indian Reservation

Both the law and the facts are evident that the Tuscarora Reservation consists of tribal lands within an Indian reservation subject to the supervision of the Secretary of the Interior. In describing the licensing powers of the Commission, Section 4(e) of the Federal Power Act refers to "the public lands and reservations of the United States." 16 U.S.C. § 797(e). The term "reservations" in turn is defined in Section 3(2) for all purposes under the Act as including "na-

(Catawba). These laws were deemed necessary to cut off Federal protections and assistance even though tribes such as the Wyandotte, Peoria and Catawba had far less contact with the United States than the Tuscarora Nation.

[40] The recognition of an Indian tribe is a political decision with which the courts will not interfere. *United States* v. *Holliday*, 3 Wall. (U.S.) 407, 419 (1866). The Government concedes in this case (FPC Brief, p. 55, fn. 40) that respondent is a recognized tribe.

tional forests, *tribal lands embraced within Indian reservations,* military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws." 16 U.S.C. § 796(2); emphasis supplied. The conclusion thus seems inescapable that the Tuscarora Reservation by definition is a reservation of the United States under the provisions of the Federal Power Act and, in particular, within the framework of Section 4(e).

Petitioners claim, however, that the plain words of the statute do not have their ordinary meaning, and contend instead that the term "reservations" in the Federal Power Act comprehends only lands owned in fee by the United States or in which the United States has some real property interest, and not lands to which respondent or any other Indian tribe may have fee title. This thesis is untenable for a variety of reasons.

1. *The plain language of the Act precludes any distinction between tribal lands owned in fee by the Indians and tribal lands held in trust by the Federal Government.* The phrase "tribal lands embraced within Indian reservations" is all-inclusive and by itself admits of no differences or limitations in terms of the holder of record title. Where the meaning of statutory words is so clear, these words uniformly are presumed to be used in their ordinary and usual sense, and the duty of interpretation does not arise. *Caminetti v. United States*, 242 U.S. 470, 485 (1917); *Lewis v. United States*, 92 U.S. 618, 621 (1876). Moreover, the language of Section 3(2) actually implies an affirmative intent not to exclude property held by Indians in fee. Specifically, Congress carefully distinguished in the Act between "tribal lands," which

were included in the definition of reservations, and individually-owned lands within Indian reservations, which were not.[41] If Congress had intended further to restrict the definition of reservations to cover only Indian lands in which the United States has some proprietary interest, appropriate language for that purpose could and would have been employed. *Wabash R. Co.* v. *United States*, 175 Fed. 5, 11 (C.A. 8, 1910).

Secondly, Section 3(2) of the Act is not so constructed or punctuated as to convey the thought that the phrase "owned by the United States [etc.]" must modify the term "tribal lands [etc.]"[42] The definition of reservations far more easily breaks down into four wholly separate and distinct categories: (a) national forests; (b) tribal lands embraced within Indian reservations; (c) military reservations; and (d) other

[41] Lands allotted in severalty to individual Indians may be condemned for any public purpose under 25 U.S.C. § 357. No comparable authority exists for the condemnation of tribal lands, regardless of whether the Government or the Tribe is the possessor of the fee.

[42] Despite the Government's allegations to the contrary (Brief, pp. 60-61, fn. 43), petitioners' argument still seems to claim too much. In other words, the reading of Section 3(2) advanced by petitioners would combine the phrases "tribal lands embraced within Indian reservations" and "other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws." Such a construction would virtually eliminate all Indian lands from the statutory definition of "reservations" since most Indian reservations, including the Warm Springs Reservation under consideration in *Federal Power Commission* v. *Oregon*, 349 U.S. 435 (1955), were established by treaty or agreement with the United States rather than under the "public land laws."

The Government's alternative reading of Section 3(2) with respect to this point is completely consistent with respondent's assertion that the phrase "owned by the United States [etc.]" does not modify the term "tribal lands [etc.]."

lands and interests in lands owned by the United States. This view that the enumerated terms each denote distinct categories, rather than serving as mere illustrations of a single category—lands owned by the United States—is supported by the separate treatment accorded two types of reserved property, national monuments and national parks, which once were included but now specifically are excluded from the definition of reservations under the Act. 16 U.S.C. § 796(2).

Lastly, the records of the Bureau of Indian Affairs show that the eighteen Pueblo tribes under jurisdiction of the United Pueblos Agency, New Mexico, owns 689,576 acres of land in fee, and the Zuni Pueblo in New Mexico holds an additional 17,635 acres of land in fee, or a total for these Indians alone of over 700,000 acres of tribal land possessed in fee.[43] A comprehensive study undoubtedly would prove that the total amount of tribal lands within Indian reservations in which the United States does not have a proprietary interest is far greater. There is no evidence on the face of the Federal Power Act or elsewhere that Congress ever intended to exclude from the coverage of Section 3(2) and the protections of Section 4(e) such a substantial area of land which had been held or might be acquired by Indian tribes within their reservations and in their own names.

2. *The legislative background and legal environment in which the Federal Power Act is set militate against*

[43] Apparently no complete compilation of the acreage owned by tribes in fee is in existence. The figures set forth in the text were obtained by counsel from local officials of the Bureau of Indian Affairs in New Mexico. In addition, the Secretary of the Blackfeet Tribe in Montana has advised counsel for respondent that these Indians possess over 30,000 acres of land in fee.

a conclusion that the statutory definition of reservations is limited to Indian tribal lands in which the United States has a proprietary interest. Prior to passage of the Water Power Act of June 10, 1920, 41 Stat. 1063, rights of way through Indian reservations for power purposes were granted under the Act of February 15, 1901, 31 Stat. 790, 43 U.S.C. § 959, and the Act of March 4, 1911, 36 Stat. 1253, 43 U.S.C. § 961. The 1911 Act, which is illustrative of these two similar statutes, reads in part as follows:

> "The head of the department having jurisdiction over the lands be, and he hereby is, authorized and empowered . . . to grant an easement for rights of way, for a period not exceeding fifty years from the date of the issuance of such grant, over, across, and upon *the public lands, national forests, and reservations of the United States* for electric poles and lines for the transmission and distribution of electrical power. . .: *Provided*, That such right of way shall be allowed within or through *any national park, national forest, military, Indian, or any other reservation* only upon the approval of the chief officer of the department under whose supervision or control such reservation falls, and upon a finding by him that the same is not incompatible with the public interest. . . ." (36 Stat. 1253; emphasis supplied.)

Thus, the 1901 and 1911 Acts governing rights of way for power purposes across "public lands . . . and reservations of the United States" not only deal with the same subject matter, but also are strikingly similar in language to Section 4(e) of the Federal Power Act.[44]

[44] According to the Secretary of the Interior, the 1920 Water Power Act conferred upon the Federal Power Commission the jurisdiction and control over rights of way for power purposes, previously exercised by the Interior Department under the 1901

An interpretation of the term "Indian reservations" as used in the former statutes, therefore, should be most persuasive in determining the scope of the latter law.

Respondent has not found a single court decision on this point.[45] In an Opinion concerning the lands of the Five Civilized Tribes, on the other hand, the Solicitor of the Interior Department did resolve the precise question as follows (58 Decisions of the Interior Department 85 (1942) at p. 99):

> "Whether or not the acts of February 15, 1901 and March 4, 1911, are applicable to lands of the Five Civilized Tribes depends upon whether such lands prior and subsequent to allotments in severalty may properly be classified as Indian reservations. I find little difficulty in holding that prior to allotment the lands belonging to the Five Civilized Tribes were legally constituted Indian reservations. * * * *It is true that the lands were conveyed in fee to the nations by patents issued by the United States,* but this did not terminate the guardianship relation existing between the Indians and the United States and they continued to be subject to the legislation of Congress enacted in the exercise of the Government's guardianship over the nations and their affairs. In this and in

---

and 1911 Acts, "except as to projects involving Indian allotments or where the electrical energy is to be developed other than hydraulically." 51 Decisions of the Interior Department 41 (1925); 53 Decisions of the Interior Department 674, 678 (1932).

[45] In *United States* v. *Oklahoma Gas & Electric Co.*, 318 U.S. 206, 215-17 (1943), this Court ruled that lands allotted in severalty to individual Kickapoo Indians under a special act of Congress in fact did not constitute a reservation. Apparently no court has decided in a case involving an actual reservation whether that term, as employed in the 1901 and 1911 Acts, applies to Indian reservations generally or to some more limited category of land.

other respects *the lands stood in exactly the same category as the lands of other legally constituted Indian reservations.*" (Emphasis supplied.)

The chief legal officer of the Department primarily responsible for executing the 1901 and 1911 Acts, therefore, has determined that these statutes apply to Indian reservations generally, regardless of whether legal title to the land is in the tribes or in the United States. This administrative construction of related laws is entitled to great weight in interpreting Section 4(e) of the Federal Power Act, particularly since the author of the Opinion was the late Felix S. Cohen, characterized by this Court as "an acknowledged expert in Indian law." *Squire* v. *Capoeman*, 351 U.S. 1, 8 (1956).

Moreover, the Interior Department Solicitor's analysis of the predecessor Acts of February 15, 1901 and March 4, 1911, places Section 3(2) of the 1920 Water Power Act in a legislative setting far different and far more favorable to respondent than the Government draws. FPC Brief, pp. 61-2. As the statute originally was drafted and passed by the House of Representatives, reservations were defined as meaning "lands and interests in lands owned by the United States. . . ." S. Rep. 180, 66th Cong., 1st sess., p. 10. The Senate then inserted the words "national monuments, national parks, national forests, tribal lands embraced within Indian reservations, military reservations, and other" at the beginning of the definition (*Ibid.*), thus bringing this language close to the text of the 1901 and 1911 Acts. By this change, in which the House subsequently concurred, Congress obviously intended to redefine "reservations" in conformity with the earlier statutes and thus to include

within the scope of Section 3(2) property in addition to lands technically "owned" by the United States.[46]

Finally, the restricted reading which petitioners would give to the phrase "tribal lands within Indian reservations" is contrary to 175 years of dealings between the Federal Government and Indian tribes, which experience forms the legal background of the Federal Power Act. Specifically, the courts consistently have ruled that Federal protections apply equally to all lands of tribes recognized by the United States,[47] whether or not the Indians' title is derived from the Government and whether or not the Government has a proprietary interest. *United States* v. *Candelaria*, 271 U.S. 432 (1926); *United States* v. *Sandoval*, 231 U.S. 28 (1913); *United States* v. *7,405.3 Acres of Land, etc.*,

[46] This thesis is consistent with the cryptic remark of the House conferees that the amendment "recasts the House definition of 'reservations'." H. Rep. 910, 66th Cong., 2nd sess., p. 7. The Commission's argument that the amendment effected "no change in substance" (Brief, p. 62), on the other hand, would ascribe to Congress a wholly meaningless act. See further the colloquy on the floor of the Senate (59 Cong. Rec. 1100 (1920)) to the effect that only the licensing provisions of the Act cover tribal property which "clearly belongs to the Indians. . . ."

[47] Neither petitioner has cited a single case contrary to the proposition that lands owned by Indian tribes in fee simple are accorded exactly the same treatment as tribal lands held in trust by the Federal Government. The fact, as noted by the Commission (Brief, pp. 71-2), that Congress may have enacted statutes which specifically distinguish between Indian reservations and lands allotted in severalty to individual Indians (e.g., Section 4 of the Act of March 3, 1901, 31 Stat. 1058, 1084, 25 U.S.C. § 311) or which specifically relate to Indian reservations created by treaty, act of Congress or Executive Order (e.g., Section 1 of the Act of February 8, 1887, 24 Stat. 388, 25 U.S.C. § 331) in no way detracts from the fact that the terms "tribal lands" or "Indian reservations" used in a general statute never have been construed as applying only to property owned by the United States.

97 F. 2d 417 (C.A. 4, 1938);[48] 18 Ops. Att'y. Gen. 235 (1885). Although the opportunity frequently has arisen, Congress has not seen fit to modify this well-settled doctrine. No reason has been advanced for carving out an exception to the general rule in the Federal Power Act and, in the absence of a positive legislative intent to deviate from the pattern of prior and existing law, no such exception should be found.

3. *The United States has a sufficient interest in the Tuscarora Reservation to bring respondent's lands within the scope of Section 3(2) and under the protective provisions of Section 4(e) of the Act.* Section 3(2) of the Act, in reciting the various categories of reservations, speaks not only of *lands* owned by the United States, but also of *interests in lands* owned by the United States. In the instant case, the United States possesses such an interest in the lands of the Tuscarora Reservation. More particularly, by virtue of 25 U.S.C. §§ 177 and 233, the United States exercises a restraint over the alienation of respondent's

---

[48] As stated by Judge Parker for a unanimous court (97 F. 2d at p. 442):

> "The determinative fact is that the federal government has assumed towards them the same sort of guardianship that it exercises over other tribes of Indians, from which it results that their property becomes an instrumentality of that government for the accomplishment of a proper governmental purpose and may not be taken from them by contract, adverse possession, or otherwise, without its consent."

Contrary to the Power Authority's contentions (Brief, pp. 53-4), incidentally, the lands involved in this case were held *in fee* for twenty-three years by the Eastern Band of Cherokee Indians of North Carolina through a tribal corporation organized under State law. *United States* v. *Wright*, 53 F. 2d 300, 309 (C.A. 4, 1931). Nonetheless, the court rejected a claim of adverse possession against the property.

property without Federal consent. This restriction on alienation, coupled with the general guardianship relation of the United States to the Tuscarora Nation, is a sufficient interest in the lands to enable the Federal Government to sue to enforce the restriction. *Minnesota* v. *United States*, 305 U.S. 382, 387 at fn. 1 (1939); *Heckman* v. *United States*, 224 U.S. 413 (1912); *Alonzo* v. *United States*, 249 F. 2d 189 (C.A. 10, 1957); cf. *United States* v. *Minnesota*, 270 U.S. 181, 194 (1926). And that restriction and relationship create a sufficient Federal interest in these lands to bring the Tuscarora Reservation within the concept of "interests in lands owned by the United States."[49]

4. *Restricting the term "reservations" in Section 3(2) of the Federal Power Act to tribal lands which the Federal Government may dispose of under the Property Clause of the Constitution would violate legislative intent by excluding from that statutory definition the bulk of all Indian reservations in the United States.* Petitioners insist that the only tribal lands which may be classified as reservations within the meaning of Section 3(2) are tribal lands which

[49] In the words of the Court of Appeals for the Tenth Circuit in *Alonzo* v. *United States*, 249 F. 2d 189, 197 (1957):

> "We are of the opinion that the Governmental interest in the instant action is as great as it would be if the fee to the lands involved were in the United States. Indeed, since the United States is suing as a guardian of a dependent nation in discharge of a fiduciary duty, its right and duty to protect the interests of its wards may be even greater that it would if it were suing in its own behalf with respect to its own lands."

Compare Cohen, *Handbook of Federal Indian Law* (G.P.O., 4th Ed., 1945), at p. 289, in which it is noted that "tribal lands, even though held by the tribe in fee, may be considered public lands of the United States for the purpose of erecting federal buildings thereon. . . ."

are the property of the United States or in which the United States has a real property interest. Such reservations, the argument runs, are licensed on the same basis as other Federal property, with the jurisdiction of the Commission stemming exclusively from the Property Clause of the Constitution (Article IV, Section 3). The fatal weakness in this contention is that, as a matter of law, most Indian reservations are not Federal property on the order of national forests or military reservations, and may not lawfully be disposed of by the United States as if they were.

To be specific, except in relatively rare instances, such as tracts purchased with Federal gratuity funds or some Executive Order reservations, tribal lands do not "belong" to the United States and simply do not constitute property which the United States may treat as its own. *Chippewa Indians* v. *United States*, 301 U.S. 358, 375-76 (1937); *Shoshone Tribe* v. *United States*, 299 U.S. 476, 497 (1937); *United States* v. *Creek Nation*, 295 U.S. 103, 109-10 (1935). Regardless of whether the Indians hold the fee, as in the *Creek* case, or the land is held in trust by the United States, as in the *Shoshone* case, the Government has no power "to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation. . . ." *Shoshone Tribe* v. *United States*, *supra*, at p. 497, quoting *United States* v. *Creek Nation*, *supra*, at p. 110. In other words, under the decisions of this Court, all lands to which Indian tribes have recognized title, whether in trust or in fee, not only are property in which the United States has an interest, but also are private property entitled to the same constitutional protections, and the classification of a trust reservation as Federal property and a fee reservation as non-

Federal property does not connote any substantive difference.[50]

Thus, the United States as a landowner freely may authorize the use of ordinary Federal property by a licensee of the Commission pursuant to the Property Clause of the Constitution. With respect to virtually all "tribal lands embraced within Indian reservations," on the other hand, the United States is not a landowner itself, but rather is a trustee or guardian for another landowner, the Indians. Under such circumstances, even though the United States may have record title, the Indians have vested private property rights in their recognized tribal lands,[51] private property

---

[50] Petitioners argue (FPC Brief, pp. 68-71; SPA Brief, pp. 65-8) that respondent's fee lands may be acquired for project purposes only through eminent domain proceedings under Section 21 of the Act, 16 U.S.C. § 814, while trust reservations are the subject of an annual charge under Section 10(e), 16 U.S.C. § 803(e). As the cases cited in the text declare, where recognized title exists both classes of tribal land are entitled to the same treatment. In this regard, although the question was not litigated below and is not here at issue, the Brief of Respondent in Opposition to the Petition notes (p. 22, fn. 10):

> "Since the Tuscarora Reservation originally was purchased by the United States with tribal funds held in trust by the United States, the payment of an annual fee to the United States for the benefit of the Tuscarora Nation pursuant to Section 10(e) for any portion of respondent's lands used under a valid Commission license might very well be entirely appropriate."

On the other side of the coin, the fact that title may be in the United States is not a bar to condemnation if Congress has authorized such action. 25 U.S.C. § 357, discussed in *Minnesota* v. *United States*, 305 U.S. 382 (1939).

[51] *United States* v. *Klamath and Moadoc Tribes*, 304 U.S. 119 (1938); *Shoshone Tribe* v. *United States*, 299 U.S. 476 (1937); see *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272 (1955), at pp. 277-78, and *United States* v. *Alcea Band*, 329 U.S. 40 (1946), at p. 52.

rights which may not be licensed or otherwise disposed of by the Federal Government by virtue *solely* of an Article in the Constitution dealing with the property of the United States.[52] In order validly to deal with such private property rights, the United States also must exercise its authority over the management of tribal affairs pursuant to the Indian Commerce Clause of the Constitution (Article I, Section 8).

Limiting the licensing jurisdiction of the Commission on "tribal lands embraced within Indian reservations" to powers derived exclusively from the Property Clause of the Constitution, therefore, would eliminate the bulk of all tribal lands in the country from the statutory definition of reservations—leaving within the scope of Section 3(2) only tribal lands which are truly owned by the United States and in which the Indians have no compensable interest. There is not the slightest indication, however, of any legislative intent

---

[52] Of the two decisions cited by the Government (FPC Brief, p. 65, fn. 47) as purportedly showing Indian lands to be Federal property, one, *United States* v. *Celestine*, 215 U.S. 278 (1909), is a criminal case where the real issue was Federal jurisdiction and not Federal ownership. The reference to the Property Clause in the second case, *United States* v. *Board of Com'rs of Fremont County, Wyo.*, 145 F. 2d 329 (C.A. 10, 1944), is purely gratuitous because the same result—protecting tribal trust lands from State taxation—can be reached under the Federal instrumentality doctrine and the Indian Commerce Clause. *United States* v. *Thurston County*, 143 Fed. 287, 289-90, 292 (1906), accord, *United States* v. *Rickert*, 188 U.S. 432, 437 (1903), and *United States* v. *Wright*, 53 F. 2d 300, 308-9 (1931). Moreover the court in the *Fremont County* case, while speaking of a Federal proprietary interest in tribal trust lands, nonetheless also recognized the rights of the Indian beneficiaries. Neither of the foregoing decisions, and no other case cited by petitioners, stands for the proposition that the United States may dispose of a tribe's vested interest in an Indian reservation (as contrasted with the Government's interest) under the Property Clause alone.

so to restrict the inclusive term "Indian reservations" to what is a minor fraction of current tribal landholdings, or so to restrict the protections of the Act, particularly the first proviso of Section 4(e), to the one class of tribal lands not legally entitled to any protection. On the contrary, the conclusion is unavoidable, as the court below determined (R. 430-31), that Congress in dealing with Indian reservations under the Federal Power Act was speaking generally and, consequently, also exercised its authority to regulate commerce with Indian tribes.[53] Apart from the foregoing considerations, this conclusion finds additional support in the language of Section 10(e) of the Act, 16 U.S.C. § 803(e), which distinguishes in the payment of annual charges between Federal "lands or other property" (significantly, the term "reservations" is not here used) and "tribal lands embraced within Indian reservations."[54]

---

[53] Petitioners' reliance upon the reference to the Property Clause in *Federal Power Commission* v. *Oregon*, 349 U.S. 435, 443 (1955), is wholly misplaced since, as this Court pointed out (p. 444), the Indians had consented to the project and the matter of tribal title was not at issue; accordingly, the question of whether the Indian Commerce Clause also applied never was reached in the case. Moreover, if the definition of reservations were restricted to lands belonging to the United States, there would be no need to make annual payments to the Indians for the use of such lands under Section 10(e).

[54] The Tuscarora Nation was eligible but elected not to adopt a constitution under Section 16 of the Indian Reorganization Act of June 18, 1934, 48 Stat. 984; 987, 25 U.S.C. § 476. Haas, *Ten Years of Tribal Government Under I.R.A.* (U.S. Indian Service, 1947), p. 18. If the Nation had so organized, respondent would have the right not only to "approve" (or presumably disapprove) the annual charge fixed under Section 10(e) of the Federal Power Act, but also would have a vested right "to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe. . . ." 25 U.S.C. § 476.

The fact that Congress did not specifically mention the Indian Commerce Clause in the Federal Power Act is, of course, immaterial, since a reference to the constitutional source of legislative authority is not necessary in any statute. *Cherokee Nation* v. *Southern Kansas Ry. Co.*, 135 U.S. 641, 657 (1890). What is important is that the power of Congress to regulate commerce with Indian tribes has been described as "Plenary", *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 565 (1903), and as "paramount and of a most sweeping character." *People* ex rel. *Ray* v. *Martin*, 294 N.Y. 61, 60 N.E. 2d 541, 545 (1945), *aff'd*, 326 U.S. 496 (1946); *United States* v. *Forty-Three Gallons of Whiskey*, 93 U.S. 188 (1876). The power is sufficiently broad to sustain the payment of an annual charge for the use of tribal property,[55] and, as has been heretofore noted, is also sufficiently comprehensive to cover lands held by Indians in fee. *Pueblo of Santa Rosa* v. *Fall*, 273 U.S. 315 (1927); *United States* v. *Candelaria*, 271 U.S. 432 (1926); *United States* v. *Sandoval*, 231 U.S. 28 (1913); Cohen, *Handbook of Federal Indian Law*

The Indian Reorganization Act does not distinguish between tribal lands held in fee and tribal lands held in trust. If Section 10(e) applies only to trust lands and Section 21, 16 U.S.C. § 814, authorizing condemnation, applies to fee land, as petitioners contend, then there is an irreconcilable conflict between the Power Act and Section 16 of the I.R.A. with respect to the licensing or acquisition for a project of fee lands owned by an organized tribe, *e.g.*, Blackfeet. See footnote 43, *supra*. No such conflict exists, of course, if lands held by the Indians in fee are considered within the statutory definition of reservations.

[55] The rule is settled that, "as regards tribal property subject to the control of the United States as guardian of Indians, Congress may make such changes in the management and disposition as it deems necessary to promote their welfare." *Morrison* v. *Work*, 266 U.S. 481, 485 (1925).

(G.P.O., 4th Ed., 1945), p. 321. In the words of this Court in the *Sandoval* case:

> "Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long-continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation *the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders,* whether within its original territory or territory subsequently acquired, and whether within or without the limits of a state." (231 U.S. 28 at pp. 45-6; emphasis supplied.)

Unless substantially all American Indian tribes are to be denied the benefits of the Federal Power Act, the Tuscarora Nation is entitled to just such "fostering care and protection" in this case.

5. *To deprive the Tuscarora Reservation of the benefits of Section 4(e) would be contrary to well-settled Government policies to safeguard Indian tribes in the use and enjoyment of their lands.* Congress in Section 4(e) of the Federal Power Act authorized the Commission to issue licenses on reservations, including tribal lands embraced within Indian reservations, only after a finding that the proposed project facility "will not interfere or be inconsistent with the purpose for which such reservation was created or acquired." 16 U.S.C. § 797(e). In so providing Congress was concerned not with the ownership, but rather with the use of reservation property. Stated another way, Congress in the first proviso of Section 4(e) expressed a policy decision—the judgment that private power projects, regardless of their intrinsic importance, still fall lower on the scale of public values than lands in

which the United States has a governmental interest.[56] Thus, under the terms of the statute, the Commission may not issue a license where, and to the extent that, a prospective project will conflict with a Federally protected land use.

With respect to Indian reservations in particular, Congress has further provided that tribal lands may not be alienated in the absence of express legislative consent. 25 U.S.C. § 177. In a sense, Section 4(e) of the Federal Power Act is an exception to this general rule, since the Commission may authorize the use of Indian lands under conditions approved by the Secretary of the Interior, if the licensed project will not be inconsistent with the purpose for which the reservation first was established. The basic pattern of Government policy to safeguard Indian tribes in the undisturbed use and enjoyment of their property, however, remains unimpaired.

As has previously been demonstrated, and as the United States here concedes, the Tuscarora Reservation clearly falls under the sheltering provisions of 25 U.S.C. §§ 177 and 233. Point I, pp. 23-31, *supra*. There is not the slightest indication in the Act that such Federally protected property, alone among all lands in which the United States has a governmental interest and contrary to overall legislative policy, is to be deemed of less public value than a power project and thus subordinate to a conflicting Commission li-

[56] Evidence of this legislative determination that reservations involve a higher and better use of land than power projects is found in the fact that Congress, less than one year after passage of the 1920 Water Power Act, deprived the Commission of any jurisdiction to issue licenses within national parks and national monuments. Act of March 3, 1921, 41 Stat. 1353.

cense. Certainly there is no evidence that Congress, in creating a minor exception to 25 U.S.C. § 177 in Section 4(e) of the Federal Power Act, intended thereby also to single out respondent's reservation and other tribal lands owned in fee for the loss of all special protections under the law.

Moreover, even if the language of Section 4(e), or the definition of "reservations" in Section 3(2), were to be considered ambiguous, this Court repeatedly has ruled that "Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith." *Carpenter* v. *Shaw*, 280 U.S. 363, 367 (1930); *Squire* v. *Capoeman*, 351 U.S. 1, 6-7 (1956); *Choate* v. *Trapp*, 224 U.S. 665, 675 (1912); *Winters* v. *United States*, 207 U.S. 564, 576 (1908). As previously noted (Point I, page 35; *supra*), a corollary canon of statutory construction is that treaties with Indian tribes and laws affecting Indians must be liberally construed for the benefit and protection of the Indians. *Jones* v. *Meehan*, 175 U.S. 1, 10-11 (1899); *United States* v. *Shoshone Tribe*, 304 U.S. 111, 116 (1938); *Tulee* v. *Washington*, 315 U.S. 681, 684-5 (1942). In the light of these principles of law, reflecting long-established Government policies to safeguard Indian tribes in the full use and enjoyment of their lands, the first proviso of Section 4(e) cannot be construed as being inapplicable to the Tuscarora Reservation.

C. Respondent Is Entitled to the Benefit of the Uncontested Finding by the Commission Under Section 4(e) That the Niagara Project Will be Inconsistent With the Purposes for Which the Tuscarora Reservation Originally Was Established.

The foregoing discussion shows that lands owned in fee by the Tuscarora Nation and other Indian tribes enjoy the same protections and are entitled to the same treatment under the Federal Power Act as any other tribal lands embraced within an Indian reservation. On remand from the court below, the Commission found as a fact that the project facilities which the Power Authority proposes to construct on respondent's reservation cannot meet the test of the first proviso of Section 4(e), and "that the license issued herein insofar as it includes lands of the Tuscarora Indian Nation will interfere and will be inconsistent with the purpose for which such reservation was created or acquired." R. 489. The Commission's conclusion has not been appealed or otherwise challenged by either petitioner, and is not at issue in this case. Respondent thus has a right to the full benefit of that uncontested finding and, consequently, under the terms of the first proviso of Section 4(e), also is entitled to an order by the Commission specifically excluding the Tuscarora Reservation from the scope of the Power Authority's license.

IV. THE COURT OF APPEALS PROPERLY DIRECTED THE COMMISSION TO EXCLUDE TUSCARORA LANDS FROM THE SCOPE OF THE LICENSE ISSUED TO THE POWER AUTHORITY

The Court of Appeals correctly decided: (1) that the express Congressional consent necessary to the taking of Tuscarora lands cannot be found in the Niagara Development Act of 1957; and (2) that the Tuscarora Reservation is an Indian reservation within

the meaning of Sections 3(2) and 4(e) of the Federal Power Act and, therefore, may not be licensed by the Commission for use in the Niagara Project in the absence of the finding required by Section 4(e). Since the Commission could not make the requisite finding, the court below properly ordered petitioner to exclude respondent's lands from the scope of the license issued to the Power Authority.

A. The Court Below Was Not Precluded From Deciding the Validity of the Commission's License Order by the Decision of the Court of Appeals for the Second Circuit

On January 30, 1958, the Federal Power Commission issued a license to the New York Power Authority for construction of the Niagara Project (R. 391-410), over the objections of the Tuscarora Indian Nation, which had intervened in the proceeding and had argued against the proposed use of approximately 1,000 acres within its reservation for a water storage reservoir. On February 28, 1958, respondent filed a timely petition for rehearing in accordance with Section 313(a) of the Federal Power Act, 16 U.S.C. § 825*l*(a), which the Commission denied on March 21, 1958. On May 16, 1958, less than 60 days after the denial of the rehearing application and within the time allowed by law, respondent filed in the Court of Appeals for the District of Columbia Circuit a petition for review of the Commission's licensing order of January 30, 1958, pursuant to Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b). The District of Columbia court thereby required "exclusive jurisdiction, to affirm, modify or set aside such order in whole or in part."[57] *Ibid.*

[57] The Power Authority contends (Brief, p. 90) that the court below did not acquire any jurisdiction at the time the petition for

The Power Authority now urges (Brief, pp. 87-95) that the court below, notwithstanding the "exclusive jurisdiction" conferred upon it by statute, in effect was precluded from determining the validity of the Commission's license order by a decision of the Court of Appeals for the Second Circuit in related litigation.[58] *Tuscarora Nation of Indians* v. *Power Authority*, 257 F. 2d 885 (C.A. 2, 1958). This thesis is untenable. The argument is based upon: (1) a false premise that the Court of Appeals for the Second Circuit passed upon either the validity of the Power Authority's license or the necessity for a Section 4(e) finding; and (2) a further false premise that any such rulings, if made, would defeat the exclusive jurisdiction of the Court of Appeals for the District of Columbia Circuit under 16 U.S.C. § 825*l*(b) "to affirm, modify or set aside" the Commission's order granting the license.

---

review was filed, and acquired exclusive jurisdiction only on June 25, 1958, when the Commission filed the transcript of record. This contention is erroneous, but need not be discussed further since the date when the court below acquired the "exclusive jurisdiction" provided by statute and here conceded by petitioner is not material in this litigation.

[58] The Power Authority's thesis that the Tuscarora Nation freely chose to litigate in the Second Circuit is somewhat of an overstatement. Faced with the appropriation of its lands on April 15, 1958, before the validity of the license order could be determined on review, respondent in fact had no other Federal forum in which to protect its property. Jurisdiction over the Power Authority in the District of Columbia, of course, could not have been obtained unless petitioner voluntarily decided to intervene in the review proceedings.

The Power Authority's attempted appropriation of Tuscarora lands on April 15, moreover, wholly negates its contention that respondent was not aggrieved until the Commission's order of May 5, 1958. SPA Brief, pp. 89, 92. This argument, flatly rejected by the court below (R. 425), is not seriously pressed in this Court.

A mere reading of its opinion discloses that the Second Circuit was aware that a "petition for review of the Commission's order is presently pending before the Court of Appeals for the District of Columbia." *Tuscarora Nation of Indians* v. *Power Authority, supra,* at p. 890. Consequently, that court held only "that the Power Authority of the State of New York *as a licensee* of the Federal Power Commission . . . is authorized to exercise the right of eminent domain according to the procedures specified in section 814 of the Federal Power Act." *Ibid.* at p. 894; emphasis supplied. In other words, for the purpose of determining whether and, if so, how petitioner could acquire Indian lands, the Second Circuit simply assumed as an existing fact—but did not consider or decide—the validity of a license which the court below had not yet set aside.

Even if the Court of Appeals for the Second Circuit had been so rash as to venture an opinion on the validity of the Power Authority's license or the application of the first proviso in Section 4(e) to the Tuscarora Reservation, however, any such ruling could have no bearing upon the outcome of this litigation. In the first place, the validity of petitioner's license was not before the Second Circuit, so its views thereon would be pure dicta.[59] *Ash Sheep Co.* v. *United States,*

---

[59] As Mr. Justice Harlan noted in passing upon the Tuscarora Nation's application for a stay of the Court of Appeals mandate (*Tuscarora Nation of Indians* v. *Power Authority,* 79 Sup. Ct. 4 (1958)):

> "[T]he validity of the Power Authority's federal license is a matter lying exclusively within the jurisdiction of the Court of Appeals for the District of Columbia Circuit. 16 U.S.C. § 825*l*(b); cf. *City of Tacoma* v. *Taxpayers of Tacoma,* 357 U.S. 320, 334-337. That being so it is difficult for me to

252 U.S. 159, 170 (1920). Secondly, the law is well-settled that the validity of a Federal Power Commission license may be adjudicated only in the court where a petition for review is properly filed. *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 334-37 (1958); *Safe Harbor Water Power Corp.* v. *Federal Power Commission*, 124 F. 2d 800, 804 (C.A. 3, 1941). The statutory direction that the court below shall have "exclusive jurisdiction" to affirm, modify or set aside the Commission's order means just what it says. 16 U.S.C. § 825*l*(b).

The doctrine here urged by the Power Authority would make a mockery of the review provisions of the Federal Power Act. Note, 72 HARV. L. REV. 1372, 1374 (1959). According to petitioner, the validity of a Commission license or, more particularly, all issues bearing upon the validity of that license may be tested in *any* court prior to the lodging of the record in the court where a petition for review is filed. Thus, if a licensee institutes condemnation proceedings under Section 21, 16 U.S.C. § 814, immediately after the license order is issued and the condemnation court enters judgment while the Commission still has a petition for rehearing under consideration, as required pursuant to 16 U.S.C. § 815*l*(a), an aggrieved party will be wholly barred on grounds of res judicata from seeking direct judicial review of the order. Congress

believe it likely that this Court would grant certiorari to review the judgment of the Court of Appeals for the Second Circuit, since the Power Authority's right to acquire Tuscarora's lands by condemnation would ultimately seem to depend upon its federal license which is presently in force and whose validity is subject to review only by the Court of Appeals for the District of Columbia Circuit. See §§ 3(2), 4(e), and 21 of the Federal Power Act, 16 U.S.C. §§ 796(2), 797(e), 814."

quite obviously never intended the validity of licenses to be finally determined in collateral proceedings to which the Commission is not even a party.[60]

B. The Court Below Did Not Exercise an Administrative Function by Ordering the Commission to Exclude Respondent's Reservation From the License

Petitioners complain (FPC Brief, pp. 73-74; SPA Brief, pp. 95-7) that the court below erred in remanding the case to the Commission with instructions to amend its order "so to exclude specifically the power of the said Power Authority to condemn the said lands of the Tuscarora Indians for reservoir purposes." R. 533. Quite plainly, however, the court below in no way invaded the area of discretion residing in the Commission. Having decided that the license could not validly cover any portion of the Tuscarora Reservation, the court below properly directed that the license be amended in such a way as to eliminate all impact upon the reservation.

The court's ruling on the merits did not leave room for the exercise of discretion by the Commission on the inclusion of respondent's lands within the Niagara

---

[60] If the Second Circuit had ruled in respondent's favor on the issues which the Power Authority says were litigated, the Commission would not have been bound thereby. Moreover, on the other side of the coin, the doctrine of res judicata can hardly be said to apply in a case where, as here, the Power Authority, intervenor below, is a party as a matter of grace and not as a matter of right.

The most that can be said of petitioner's res judicata argument in this case is that, if the Tuscarora Reservation were not protected by Section 4(e), then the Second Circuit decision to the effect that respondent's property may be condemned under Section 21 would be binding. The court below, however, did not necessarily disagree with this conclusion. R. 430-31; compare footnote 50, *supra*. Furthermore, the point is of little practical value to the Power Authority where, as here, Section 4(e) prevents the inclusion of Tuscarora lands under the license.

Project. Petitioners, therefore, cannot and do not suggest that a different order on remand in any way would change the ultimate disposition of this case with respect to the Tuscarora Reservation, the only property here involved. Similarly, there was no need for the court below in its order on remand expressly to permit the Commission to consider alternative or smaller reservoir sites. Those issues then were and still are pending before the Commission on the application for an amended license filed by the Power Authority.

In short, there was nothing for the Commission to reconsider on remand in light of the narrow holding and direction of the Court of Appeals, and for this Court to require such a remand would be a meaningless gesture. This case thus is entirely unlike *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20-21 (1952), where the lower court had tried to exercise an administrative function in its order.

Conclusion

For the foregoing reasons, the decision of the Court of Appeals for the District of Columbia Circuit should be affirmed.

Respectfully submitted,

ARTHUR LAZARUS, JR.
1700 K Street, Northwest
Washington 6, D. C.
Attorney for Respondent,
Tuscarora Indian Nation.

Of Counsel:

EUGENE GRESSMAN
1701 K Street, Northwest
Washington 6, D. C.

November 30, 1959.